Supreme Court, U.S.
FILED

931903 MAY - 6 1994

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NO. _____

In The

Supreme Court of the United States

October Term, 1993

ISSIAH ROSS, JR., TABITHA HERRING, JAMES C. HOMER, JOHNNIE LEE PALMS, GERRY PLANT, WILLIAM MORGAN PORTER, VERNON ALEXANDER PUTMAN, GEORGE RUMPH, FRANKLIN ROOSEVELT SCOTT, EDDIE SLAUGHTER, JOHN W. TAYLOR, NANNETTE TYSON and HOSEY J. WHITE, JR.

Petitioners,

v.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that in a suit brought under Title VII for wage discrimination where a black employee was paid less money each week for doing the same job as white employees, each week's paycheck (which pays less money to the black than the similarly situated white) is NOT a new cause of action, and the suit is time barred if the black employee does not find out and file charges within 180 days of the first occasion he is a victim of wage discrimination?

2. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit

which holds that in an employment discrimination case brought under Title VII involving wage discrimination against black employees, where an employer uses several different or revised pay systems over a period of eight years, and employees' pay is frequently changed while always leaving the black worker on a lower pay scale than the similarly situated white employee, a black employee who is a victim of discrimination is completely barred from ever filing suit if he doesn't file a charge of discrimination with the EEOC within 180 days of the first occasion the employer discriminates against him by paying a white employee a greater weekly wage for doing the same work?

3. Should this Court grant certiorari to review a decision by the United States

Court of Appeals for the Eleventh Circuit which holds that in an employment discrimination case brought under Title VII involving systematic wage discrimination against black employees, it is NOT a continuing violation of Title VII if an employer pays white employees more money in each week's paycheck than black employees who are doing the same work at the same level of ability?

4. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that if an employer institutes a wage freeze of all employees, and the freeze perpetuates prior discrimination which caused black employees to be paid less money each week for identical work than equally qualified

white employees, this freeze is NOT an act which violates Title VII?

5. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that employees are time barred from filing suit to redress claims of race based wage discrimination due to the disparate impact of an arbitrary and subjective pay system because the employees could have filed a lawsuit earlier and obtained information through discovery which would have revealed that they were victims of a discriminatory pay system, even though the employer denied to the EEOC and to the employees counsel that black employees earned a lower weekly wage than white employees, the employees did not know that the employer was paying a

higher average weekly wage to similarly situated white employees who were doing the same work, did not know that the employer had instituted a secret skills point system and pay curve matrix for calculating pay, and only discovered the information giving rise to their cause of action through discovery provided by Defendant after suit was filed?

6. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that eleven Title VII litigants' claims for pay discrimination by being paid weekly wages less than similarly situated whites were time barred for failure to file a charge of discrimination with the EEOC within 180 days where:

- the Defendant never raised in its answer a statute of limitations defense on the specific ground that the EEOC charges were filed more than 180 days after the violation (only a pro forma general statute of limitations defense was raised)

- the Defendant never raised any statute of limitations defense in any part of the pretrial order, including its contentions on the issue of Title VII disparate impact

- the issue of statute of limitations was never mentioned during the trial

- because the statute of limitations issue was not raised in the pretrial order or during trial, there was no evidence in the trial record as to the date the charges of discrimination were filed with the EEOC for the various plaintiffs

- because statute of limitations was not an issue at trial, Plaintiffs did not introduce any evidence to show when they became aware of claims of pay discrimination or any evidence on the issue of equitable tolling of the statute

- the Defendant never moved for directed verdict at the jury trial or judgment n.o.v. on grounds that the Plaintiffs' claims were barred by an applicable statute of limitations

- the first mention by Defendant that Plaintiffs' claims were time barred came six months after trial in the final brief allowed by the trial court, and the trial court then issued an oral order prohibiting further briefing on any issue

- the trial court specifically found that the Plaintiffs' claims regarding wage

discrimination were not claims subject to being time barred, but even if they were, that the wage freeze instituted by the Defendant was an independent act perpetuating the effects of prior discrimination which would have been actionable under Title VII

- the trial court further specifically found that even if the wage discrimination claims were claims subject to being time barred, that the claims would have been subject to equitable tolling because the Defendant kept secret the information necessary for Plaintiffs to be apprised that they had a wage discrimination claim under Title VII.

6. Should this Court grant certiorari to review a decision by the United States

Court of Appeals for the Eleventh Circuit which holds that in a jury trial of a 42 USC Section 1981 and Title VII Disparate Treatment employment discrimination case with issues involving termination, pay, and conditions of employment, a court can properly exclude the only direct evidence that a plant manager and other decision-making managers used racial epithets such as "nigger", put blacks in an all black "bull gang" to do the dirtiest work, and deliberately fired black employees, because the Plaintiffs' attorney did not use the phrase "smoking gun" when he made an offer of proof to the trial court or "otherwise highlight the significance of the evidence"?

7. Should this Court grant certiorari to review a decision by the United States

Court of Appeals for the Eleventh Circuit which holds that during a jury trial on a 42 USC Section 1981 and Title VII disparate treatment claim of intentional racial discrimination regarding pay, once the Plaintiffs have made out a prima facie case on all issues, the employer can avoid a directed verdict or judgment n.o.v. even if it never calls any one of its decision-makers to explain why a decision was made to pay any of the Plaintiffs less money than similarly situated whites?

8. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that during a jury trial on a 42 USC Section 1981 and Title VII disparate treatment claim of intentional racial discrimination regarding pay, once

the Plaintiffs have made out a prima facie case on all issues, the employer can avoid a directed verdict or judgment n.o.v. by introducing anecdotal evidence from persons other than the actual decision-makers regarding alleged incidents occurring years after or years before the pay decision was made, when similarly situated white employees committed the same infractions but were still paid a higher weekly wage for doing the same work?

9. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that an employer can justify a specific decision to pay a black employee less money than similarly or identically situated whites by relying on

general categorizations of the black as being "lazy" or "average" in skill without giving objective evidence substantiating the opinion, even though higher paid whites are also rated "average" and have no more skill or qualifications than the black employee?

10. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that during the damages phase of a trial, a trial court can prohibit plaintiffs' counsel from mentioning evidence which was introduced during the trial?

LIST OF ALL PARTIES IN THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS

Plaintiffs and Petitioners herein:

TABITHA HERRING
JAMES C. HOMER
JOHNNIE LEE PALMS
GERRY PLANT
WILLIAM MORGAN PORTER
VERNON ALEXANDER PUTMAN
ISSIAH ROSS, JR.
GEORGE RUMPH
FRANKLIN ROOSEVELT SCOTT
EDDIE SLAUGHTER
JOHN W. TAYLOR
NANNETTE TYSON
HOSEY WHITE, JR.

Defendant and Respondent herein:

BUCKEYE CELLULOSE CORPORATION (now Procter & Gamble Cellulose, a wholly owned subsidiary of Procter & Gamble Company).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This case was reported below as *Ross et al. v. Buckeye Cellulose Corp.*, 980 F. 2d

648 (11th Cir. 1993)(reh. den. 2/8/94), which encompassed consolidated appeals from *Ross et al. v. Buckeye Cellulose Corp.*, 733 F. Supp. 344 (M.D. Ga. 1989), *Ross et al. v. Buckeye Cellulose Corp.*, 733 F. Supp. 363 (M.D. Ga. 1990), and *Ross et al. v. Buckeye Cellulose Corp.*, 764 F. Supp. 1543 (M.D. Ga. 1991). A companion case for two Petitioners herein, Tyson and Rumph, was decided by the United States Court of Appeals for the Eleventh Circuit in an unpublished opinion issued April 20, 1994. (Appendix F.)

On January 4, 1993, the United States Court of Appeals for the Eleventh Circuit reversed a decision by the trial court awarding damages to six (of eleven) individual plaintiffs who were victims of

a racially discriminatory pay system. Motions for rehearing and rehearing en banc were denied February 8, 1994.

JURISDICTIONAL STATEMENT

(i) Date of entry of decree to be reviewed: January 4, 1993 (11th Circuit opinion).

(ii) Date of denial of Petitioners' motion for rehearing and motion for rehearing en banc: February 8, 1994.

(iii) Not applicable.

(iv) Jurisdiction is founded under 28 U.S.C. Section 1254(1): "Cases in the courts of appeals may be reviewed by the Supreme Court by... writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTORY PROVISIONS

42 USC Sec. 1981. Equal rights under the law:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USC Sec. 2000e-2. Unlawful employment practice

(a) Employer practices:

It shall be an unlawful employment

practice for an employer...

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 USC Sec. 2000e-5

(e) Time for filing charges; time for service of notice of charge on respondent;

filing of charge by Commission with State or local agency:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge

shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, an a copy of such charge shall be filed by the Commission with the State or local agency.

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders:

If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the

complaint; the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years' prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligency by the person or persons discriminated against shall operate to reduce the back pay otherwise

allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS Section 2000e-3(a)].

STATEMENT OF THE CASE

This Petition for Certiorari asks this Court to review a decision of the United States Court of Appeals for the Eleventh Circuit which reversed a judgment from the United States District Court for the Middle District of Georgia in favor of six black employees who were victimized by a racially discriminatory pay system operated by Defendant from 1980 through 1990, the date of the final hearing on damages. (Appendix A, App. 32-37.)

The Eleventh Circuit reversed on grounds that the suit was time barred without reaching the merits although that issue was never raised at the trial of the case and although the Plaintiffs did not have the information available to them to file

a charge of discrimination. The Eleventh Circuit also ruled, directly contrary to rulings in this Court and other Circuits, that wage discrimination claims are not a continuing violation and are time barred if the employee does not file a charge of discrimination within 180 days of the first time the employer discriminates against the employee. (Id.)

This Petition also seeks review of the same decision which held that a wage freeze which perpetuates prior acts of discrimination is not an actionable wrong under Title VII. (Appendix A, App. 32.)

Curiously, in an unpublished opinion another panel of the Eleventh Circuit held in a related case involving two of the petitioners herein that the 1984 wage freeze was starting point for the

limitations period, even though the published decision Petitioners seek to review actually held that the October 1984 wage freeze was NOT a wrong actionable under Title VII. (See Appendix F, App. 239, 242-243.) However, the unpublished decision squarely rejects the precedent of this Court which holds that each week's paycheck is a new cause of action in a wage discrimination case. (Id. at App. 242-243.)

This Petition also seeks review of the Court of Appeals opinion which affirmed various rulings of the District Court during the trial, including rulings excluding direct evidence of racial antipathy on the part of Buckeye's management (use of the word "nigger", putting black employees in a "bull gang"

to do the dirtiest work available, arbitrarily firing black employees due to racial prejudice). Although agreeing that the evidence was germane to the issue and not repetitive (it was the only evidence of this sort and it came from a person who was also in management at the time the remarks were made), the Eleventh Circuit imposed a new rule holding that Plaintiffs' were specifically required to cite the evidence as "smoking gun" evidence or otherwise "highlight the significance" of the evidence when making their offer of proof to the District Court. (Appendix A, App. 18-20.)

This Petition also asks this Court to correct by Certiorari the Eleventh Circuit's holding that in a Title VII disparate treatment action, once the

employee has made out a prima facie case, the employer does not have to produce any evidence which would articulate a legitimate nondiscriminatory reason for preferring the white to the black employee. (Appendix A, App. 23.)

The background of this action is as follows: thirteen black present and former employees of a paper mill owned by Buckeye Cellulose Corp. sued under Title VII (42 USC Sec. 2000e-5(f)(3) by 11 of the plaintiffs) and 28 USC 1343 and 42 USC Sec. 1981 (all 13 plaintiffs) in separate cases consolidated for a jury trial in 1988 in the Middle District of Georgia. All 13 had causes of action regarding pay and conditions of employment. Two, Issiah Ross, Jr. and William Morgan Porter, also had causes of action

involving their being fired. (Appendix B, App. 53-54.)

The District Court found that during the long jury trial, the employees, all black, had proved that systematic wage discrimination existed against black employees because of the use of wholly arbitrary and subjective pay decisions. (Appendix B, App. 111.)

Two employees, Issiah Ross, Jr., and Gerry Plant, obtained jury verdicts on their behalf under 42 USC Section 1981- Ross for his termination for complaining about the discrimination against black employees, and Plant for wage discrimination. Six employees, including Ross, Plant, Tabitha Herring, James Homer, Johnny Palms, and John Taylor, were later awarded judgments by the trial court under

a Title VII disparate impact cause of action for the injuries caused by the application of the pay system. William Morgan Porter was unsuccessful on any claim, including his termination by the plant manager. (Appendix C, App. 117, 170.)

The facts essential to this appeal (as found by the District Court) are as follows: a pay system was implemented when the plaintiffs were hired and the plant opened in 1980. [Two plaintiffs, Scott and Slaughter, were hired with a group in 1981.] All new hires were paid the same weekly wage (initially $288 per week) and were given uniform raises over the first two years, with no preference being give due to seniority, prior education, prior skills, or prior work

experience. Starting in 1981 and 1982, the pay system changed, with arbitrary decisions being made by management to pay different weekly wages to different employees doing the same job. (Appendix B, App. 53-77.)

By 1984, this system resulted in white employees earning significantly higher weekly wages (as much as $142 each week) than black employees working side by side with them doing the same job. The company paid the white employees more because they were expected, over the course of coming months or years, to learn more skills than the black employees who were doing identical work with identical skill and effort. (Id.)

Each employee was given a schedule for anticipated advancement called a "career

plan", which was encompassed in a one page document. The document listed the skills the employee was expected to learn in the future. Also, the career plans provided that employees who were expected to learn more skills or more valuable skills (according to a secret points plan and a pay curve matrix) were to be prepaid in advance of actually learning those skills. (Appendix B, App. 71.) These career plans were changed every several months in some cases, but actual wages were determined by a "pay curve" assigned to each employee, which may or may not change in new career plans. (Id.)

The District Court found that white employees benefited from this system and blacks (including the prevailing plaintiffs) were generally awarded fewer

or less valuable skills, resulting in lower pay. Even after the pay system was abandoned in the fall of 1984 and pay curves were frozen, white employees were left on higher pay curves regardless of whether or not they actually acquired the skills in their career plans. (Appendix B, App. 71.)

The system was changed several times over the years, but in the fall of 1984 (no precise date was presented at trial, as there was no statute of limitations issue raised until months after the trial had ended), the pay system was "frozen" or "put on hold" and only cost of living raises were given until a new system was installed in the 1987-1988 period. No further career plans were to be assigned to employees, with the result that the pay

system froze black employees on lower pay rungs than white employees, with no hope of matching their white counterparts' earnings. (Appendix B, App. 70, 108.) For some plaintiffs, this disparity caused by the 1984 freeze lasted all the way through the last date the trial court heard evidence on the damages issue in 1990. (Appendix D, 179.)

The eleven plaintiffs with Title VII claims separately filed charges of discrimination in early 1985 (in January, March and April- the actual dates were not introduced at trial because no statute of limitations defense was raised at trial). In any event, the charges were filed within 180 days of each employee being discriminated against because of white employees earning a higher weekly wage and

also, incidentally, within 180 days of the wage freeze. (Appendix B, App. 88, 89.)

Eleven separate suits involving the Title VII plaintiffs were filed over the 1985-1987 period within 90 days of receiving right to sue letters from the EEOC. [Nannette Tyson and George Rumph filed a separate Title VII action and their only claims in the district court in this case involved 42 USC Section 1981. Appendix F.]

Although Buckeye raised a general defense of statute of limitations in its answers to the suits, no mention of the 180 day statute of limitations for filing EEOC charges was raised in the pretrial order in the section dealing with the Title VII disparate impact claims. No mention of the 180 day statute of

limitations for filing EEOC charges was made by Buckeye at any point during the four month jury trial in 1988 (evidence on both Title VII claims of disparate impact and Title VII and 42 USC Sec. 1981 claims of intentional discrimination was presented at the trial). No motion for directed verdict was made by Buckeye on grounds of the 180 day statute of limitations. (Appendix A, App. 47-50.)

Because the 180 day statute of limitations was not an issue, plaintiffs did not introduce their EEOC charges at trial, and they did not introduce any evidence which would have been pertinent to the issue- including any evidence pertinent to equitable tolling.

During the trial, all thirteen plaintiffs made out prima facie cases of

discrimination in pay for the purposes of their 42 USC Section 1981 and (for eleven plaintiffs) Title VII disparate treatment claims. However, Buckeye chose not to present any evidence from any person who made the pay decisions in any plaintiff's case as to why the plaintiff was paid less money for doing the same job as a similarly situated white employee in the same work area whose qualifications Buckeye rated as no higher than plaintiff's. Although Buckeye had not met its burden of production of evidence on this issue (it did not even attempt to articulate a justification for paying any of the plaintiffs less money than equally qualified- or in some cases, less qualified- white employees), the trial court denied plaintiffs' motions for

directed verdicts and judgments notwithstanding the verdict. (Appendix A, App. 20-24.)

During the trial, plaintiffs attempted to introduce evidence that specific managers with supervisory capacity over the plaintiffs, including the plant manager at the Oglethorpe, Georgia facility, had used racial epithets, referring to their black employees as "niggers", had put black employees in a "bull gang" which was assigned the "dirtiest work in the plant". Plaintiffs' also attempted to introduce evidence that the plant manager had arbitrarily fired or otherwise terminated black employees because he did not like having black people working for him. (Appendix A, App. 16, 17.)

This evidence was rejected by the trial court after an offer of proof was made because it involved acts committed by the managers when they worked at a different plant owned by Defendant before they were transferred to the Oglethorpe, Georgia facility in 1980. [The Eleventh Circuit's opinion incorrectly states this evidence was offered for "impeachment"; however, it is not relevant to this petition whether or not it was offered in Plaintiffs' case in chief, which, in fact, it was.] (Appendix A, App. 16-20.)

During closing argument on the issue of damages for the two plaintiffs who prevailed on their 42 USC Section 1981 claims (Ross and Plant), the trial court prohibited plaintiffs' counsel from commenting on or discussing evidence

introduced at trial concerning other acts of discrimination by Buckeye against black employees who worked there or from commenting on Buckeye's refusal to reinstate Ross, whom they had fired for protesting discriminatory practices by the Company. (Appendix A, App. 24, 25- the Eleventh Circuit was incorrect in its assertion that no evidence was introduced concerning the two individuals, although the trial court's order was sweeping enough to prohibit mention of any discriminatory acts against persons other than the two plaintiffs seeking damages, even though those matters were introduced into evidence at trial.)

The United States Court of Appeals reversed the District Court's decision holding that six of the Plaintiffs were

entitled to recover damages suffered by virtue of the application of a racially discriminatory pay system.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS, AND BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT, ON THE ISSUE OF WHETHER A BLACK EMPLOYEE SUING FOR WAGE DISCRIMINATION MUST FILE AN EEOC CHARGE WITHIN 180 DAYS OF THE FIRST OCCURRENCE OF AN ACT OF DISCRIMINATION

The United States Court of Appeals for the Eleventh Circuit has held in this case that a black person suing over wage discrimination where white persons are paid higher weekly wages for doing the same work must file a charge of discrimination with the EEOC within 180 days of the first time this event occurs, regardless of the lack of knowledge of the employee over the fact that he has been

the victim of discrimination and regardless of the fact that a separate discriminatory act occurs with the receipt of each week's paycheck.

The decision of the Eleventh Circuit directly conflicts with the decision of this Court in *Bazemore v. Friday*, 478 US 385, 395-396, 106 S Ct 3000, 92 L Ed 2d 315 (1986) and of the United States Court of Appeals for the Fourth Circuit in *Nealon v. Stone*, 958 F 2d 584, 591 (4th Cir. 1992) which hold that:

"Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII..."

Bazemore, supra.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS, AND BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT, ON THE ISSUE OF WHETHER A WAGE FREEZE WHICH PERPETUATES PRIOR DISCRIMINATORY ACTS IS A SEPARATE WRONG ACTIONABLE UNDER TITLE VII

The United States Court of Appeals for the Eleventh Circuit has decided in this case that a wage freeze which operates to perpetuate the effects of prior discrimination by leaving black employees on lower pay rungs than similarly situated white employees is not an event which violates Title VII. This contradicts the decisions of this Court in *Griggs v. Duke Power Co.*, 401 US 424, 91 S Ct 849, 28 L Ed 2d 148 (1971); *Bazemore v. Friday*, 478 US 385, 395-396, 106 S Ct 3000, 92 L Ed 2d 315 (1986); *Watson v. Fort Worth Banking Company*, 487 US 977, 987, 101 L Ed 2d 827, 108 S Ct 2777 (1989), and of the United

States Court of Appeals for the Tenth Circuit in *Thornton v. Coffey*, 618 F 2d 686, 690 (10th Cir. 1980)(policies, procedures or tests neutral on their face and/or intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices) and the Fourth Circuit in *United States v. Dillon Supply Company*, 429 F 2d 800, 803-804 (4th Cir. 1970).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS, AND BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT, ON THE ISSUE OF WHETHER A STATUTE OF LIMITATIONS DEFENSE CAN BE RAISED IN A FINAL BRIEF FILED SIX MONTHS AFTER TRIAL WHICH WAS NEVER AN ISSUE IN THE PRETRIAL ORDER OR DURING THE ENTIRE TRIAL

The United States Court of Appeals for the Eleventh Circuit has decided in its opinion in this case that a plaintiff's suit can be subject to dismissal after

trial on a statute of limitations defense not contained in the pretrial order and never raised at trial. Aside from the fact that this precluded Plaintiffs from putting forth any testimony on this issue at trial (such as evidence that pay decisions concerning individual plaintiffs such as Ross, Scott and Plant were within the 180 day statute of limitations even if the Eleventh Circuit is correct in its holding that wage discrimination is not a continuing violation and a wage freeze is not an actionable wrong), this holding conflicts with the decisions of other circuits in *Erff v. Markhon Industries, Inc.*, 781 F. 2d 613, 617 (7th Cir. 1986)("Because the parties rely on the pretrial conference to inform them precisely what is in controversy, the pre-

trial order is treated as superseding the pleadings and establishes the issues to be considered at trial.") and *Colonial Refrigerated Transportation, Inc. v. Worsham*, 705 F 2d 821 (6th Cir. 1983).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS BECAUSE THE ELEVENTH CIRCUIT HAS HELD THAT EVIDENCE OF RACIAL ANTIPATHY ON THE PART OF THE EMPLOYER'S TOP MANAGEMENT CAN BE EXCLUDED FROM TRIAL IF THE EMPLOYEES' TRIAL COUNSEL DOES NOT USE THE WORDS "SMOKING GUN" OR "OTHERWISE HIGHLIGHT THE SIGNIFICANCE OF THE EVIDENCE" WHEN MAKING AN OFFER OF PROOF

The United States Court of Appeals for the Eleventh Circuit has decided that direct evidence of racial epithets such as "nigger" and other antipathy on the part of decision-making managers (including the plant manager who devised the pay system and personally approved the firing of both

plaintiffs who were terminated) was properly excluded from consideration by the jury deciding a 42 USC Section 1981 action for intentional racial discrimination because the plaintiffs' counsel did not use the words "smoking gun" or "otherwise highlight the significance of the evidence." (Appendix A, App. 20.)

This decision conflicts with the decision of this Court in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and decisions of other circuits which have held that evidence of derogatory remarks or racial attitudes of the managers who were alleged to have engaged in discrimination against the plaintiffs was relevant and probative on

the issue of disparate treatment. *Pitre v. Western Elec. Co. Inc.*, 843 F. 2d 1262, 1270 (10th Cir. 1988)(managers who had "discrimina-tory attitudes toward women); *Brown v. Board of Trustees of Boston University*, 891 F. 2d 337, 349 (1st Cir. 1989)(derogatory remarks indicative of discriminatory attitude).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT AND OTHER CIRCUITS BECAUSE THE ELEVENTH CIRCUIT HAS HELD THAT AN EMPLOYER NEED NOT PRODUCE ANY EVIDENCE TO ARTICULATE A LEGITIMATE, NONDISCRIMINA-TORY REASON FOR PAYING A BLACK EMPLOYEE LESS MONEY THAN AN EQUALLY QUALIFIED WHITE EMPLOYEE DOING THE SAME JOB

The United States Court of Appeals for the Eleventh Circuit has decided that an employer need not articulate a legitimate, nondiscriminatory reason for paying black employees less than white employees who are no more qualified than the blacks and

doing the identical work. Instead, it has ruled that an employer may present evidence from persons other than the actual decision-makers that some individual plaintiffs (not all) had, over the course of eight years, "occasionally made operating errors, been late or absent from work, or shown character flaws," [Appendix A, App. 22] this justifies paying every plaintiff less money than identically situated white employees whom the employers' own pay system had rated no higher than the plaintiffs and who made similar operating errors, and had also been late or absent from work or had character flaws.

No evidence was presented by the employer that any of the aforementioned information was taken into account by any

decisionmaker when plaintiffs' pay was determined. No evidence was presented by the employer to explain why it paid more money each week to similarly situated white employees who committed similar minor infractions and who were rated no higher than the comparable plaintiffs. In fact, Buckeye never articulated a reason at any point during the trial to explain why it paid plaintiffs less money than white employees with no higher skills or effort (under its own rating system, flawed though it was) who performed the same job. Buckeye never even called to the stand some of the plaintiffs' decision makers on the issue of pay during the entire trial [nor was their testimony presented by any other means, such as through memoranda, other documents or

deposition].

This decision conflicts with this Court's decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253, 255, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981) and with the United States Court of Appeals *Mitchell v. Baldrige*, 759 F. 2d 80 85, fn. 3 (D. C. Cir. 1985); *Lincoln v. Board of Regents*, 697 F. 2d 928, 937 (11th Cir. 1983); *Nanty v. Barrows Company*, 660 F. 2d 1327, 1330, 1332 (9th Cir. 1981); *EEOC v. Am. Nat'l Bank* 652 F. 2d 1176, 1200 (4th Cir. 1981).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS BECAUSE THE ELEVENTH CIRCUIT HAS HELD THAT TRIAL COUNSEL MAY BE PROHIBITED FROM BRINGING UP EVIDENCE ADMITTED DURING TRIAL IN HIS FINAL ARGUMENT TO THE JURY

The Eleventh Circuit has ruled that a

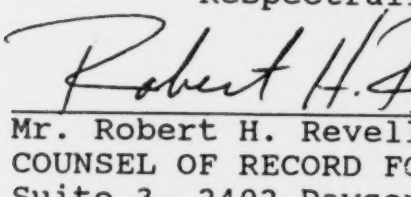
trial judge has the discretion to prohibit trial counsel from mentioning evidence properly admitted in that trial in his final argument to the jury. (Appendix A, App. 25). This ruling conflicts with rulings in other circuits which hold that a party is entitled to his legitimate argument to the jury so long as the argument is "confined to the issues of the case, the applicable law, the pertinent evidence, **and such legitimate inferences as may properly be drawn therefrom.**" *Chicago & N. W. Ry. Co. v. Kelly*, 84 F. 2d 569, 573 (8th Cir. 1936)(emphasis added).

CONCLUSION

For all of the previously stated reasons, Petitioners pray that this Court grant a writ of certiorari to review the

decision of the United States Court of Appeals for the Eleventh Circuit

Respectfully submitted,



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EDITOR'S NOTE

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ISSIAH ROSS, JR., TABITHA HERRING, JAMES C. HOMER, JOHNNIE LEE PALMS, GERRY PLANT, WILLIAM MORGAN PORTER, VERNON ALEXANDER PUTMAN, GEORGE RUMPH, FRANKLIN ROOSEVELT SCOTT, EDDIE SLAUGHTER, JOHN W. TAYLOR, NANNETTE TYSON and HOSEY J. WHITE, JR.

Petitioners,

v.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

Volume I of II

APPENDIX to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX: LOWER COURT OPINIONS

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Issiah ROSS, Jr., Eddie Slaughter, William Morgan Porter, Johnnie Lee Palms, James C. Homer, John W. Taylor, Vernon Alexander Putman, Hosey J. White, Jr., Franklin Roosevelt Scott, Gerry Plant, Tabitha Herring, George Rumph, Nanette Tyson,

Plaintiffs-Appellants,

vs.

BUCKEYE CELLULOSE CORPORATION, Defendant-Appellee.

William Morgan PORTER, Plaintiff-Appellant, v. BUCKEYE CELLULOSE CORPORATION, Defendant-Appellee.

Issiah ROSS, Jr., et al., Plaintiffs-Appellees, v. BUCKEYE CELLULOSE CORPORATION, Defendant-Appellant.

Issiah ROSS, Jr., et al., Plaintiffs-Appellees, Cross-Appellants, v. BUCKEYE CELLULOSE CORPORATION, Defendant-Appellant, Cross-Appellee.

Issiah ROSS, Jr., Johnnie Lee Palms, James C. Homer, John W. Taylor, Gerry Plant,

Tabitha Herring, Plaintiffs-Appellees, Cross-Appellants, v. BUCKEYE CELLULOSE CORPORATION, Defendant-Appellant, Cross-Appellee.

Nos. 89-8378, 89-8703, 89-8722, 90-8470, 91-8641.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

980 F.2d 648

January 4, 1993, Decided

Appeals from the United States District Court for the Middle District of Georgia. DISTRICT BANKRUPTCY COURT DOCKET NO. 86-0048-ALB-AMER(DF). D/C Judge FITZPATRICK

As Corrected.

COUNSEL

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JUDGES

Before ANDERSON, Circuit Judge, HILL and ESCHBACH n* Senior Circuit Judges.

AUTHOR: ANDERSON

OPINION

ANDERSON, Circuit Judge:

I. FACTS

Appellants in this action are all black, present or former employees of appellee Buckeye Cellulose Corporation ("Buckeye"). n1 Buckeye is an Ohio corporation and a wholly owned subsidiary of Procter & Gamble Paper Products Company. Buckeye owns several plants in various states around the country, including one in Macon County, Georgia, near Oglethorpe, known as the "Flint River Plant." For a description of the Flint River Plant's organization and operations, see Ross v. Buckeye Cellulose Corp., 733 F. Supp. 344, 347-48 (M.D.Ga.1989) ("Buckeye I").

In December, 1979, Buckeye hired the first group of employees -- known as "technicians" -- to prepare for the opening of the Flint River Plant. In the Summer of 1980, Buckeye hired the remainder of the work force in four stages. Initially, all of the technicians within a hire group were paid the same amount. At the three and six month periods of employment, each technician received uniform pay increases. It was not until the end of nine months of employment that each technician entered the career planning process that determined the technician's wage based on individualized factors.

The career planning process gradually evolved into the Pay and Progression ("P & P") System that appellants' suits challenge as discriminatory. The district court described the process by which Buckeye established the technicians' initial career plans: n2

First, Buckeye conducted Plant-wide shift team meetings to explain the system. The managers then gathered information about each technician's performance on the

job. Each technician then met with his manager to discuss his performance level, and his or her interests, goals and expectations. Each technician completed an "Interest Form" to identify preferences for career plans. The Unit Management Team then met to evaluate the gathered information in conjunction with the employees' preferences and the "ideal skill mix." The Unit Management Team then assigned proposed career plans and submitted them for approval to the Pay and Progression Review Board. The Review Board either accepted or modified the proposed career plan for each employee and then assigned him or her to a pay curve level. A pay curve was, at that time, one of two pay levels on which a course of pay increases was charted in relation to the career plan and the timing intervals established by the plan. Once the career plans were approved by the Board, managers reviewed them with each technician.

Id. at 349.

Sometime in 1982, Buckeye made significant changes to the P & P System. Plant Manager Burt Richards created a method of measuring the value of the various skill areas in relation to one

another by assigning a point value to each skill. Buckeye did not divulge these values to any of its employees, although "testimony at trial indicated that at least some employees became aware of the point values, their significance, and the skills necessary to obtain a desired goal/pay level." Id. Buckeye also instituted a ranking system whereby each technician's performance and contribution was "force" ranked on a scale of 1 to 5. n3 The district court found that this ranking system was "almost totally a subjective program, with few, if any, standards to guide the managers." Id.

Under the modified P & P System, Buckeye considered a technician's career plan, the skills contained therein (whether or not the technician ever actually acquired them), and the points assigned to those skills in order to establish the technician's pay curve. If the ranking system indicated that the technician's performance and contribution were either above or below average, the technician's pay might be shifted by, at most, one pay curve, n4 but this variance was not automatic. In addition, Buckeye assigned each of the five units in the plant an average pay curve rate that was

to be maintained within the unit. In the Summer of 1982, Buckeye also began administering examinations, called "Qualification Review Boards," to gauge each technician's progress under his or her career plan. A qualification board generally consisting of between three and five members conducted the examination, which was oral and was not recorded. Buckeye provided guideline questions to the qualification board members, but the board members were not required to ask these questions and were free to ask any relevant questions. At the completion of the examination, the board members conferred to reach a consensus as to the appropriate rating for the technician based upon both objective standards and the board members' "gut feelings." Buckeye made an appeals process available to technicians who were unhappy with their Qualification Review Board results.

In 1982, after the first series of Qualification Review Boards had been administered, Buckeye undertook a second career planning process similar to the first. This time, however, technicians who had not achieved a certain level of proficiency in their Qualification Review Boards often were not allowed to receive

additional skills in their career plans and sometimes were not allowed to retain those in their initial career plans. The district court found that these second career plans "were the essential ingredient in establishing a technician's pay curve." Id. at 351. Furthermore, the court found that each technician's pay curve, "once established, was the basis for his entire pay history at Buckeye, and was a chief result of the fundamental elements of the Pay and Progression System which left a great deal of responsibility with the subjective decisions of the managers." Id. After this second career planning process, there were no subsequent plant-wide reevaluations, although modifications to certain career plans occurred on individual bases.

In October, 1984, Buckeye froze its entire P & P System because of alleged low production, waning production quality, and high costs. The freeze precluded changes in technicians' pay curves from 1984 until 1987, when a revised P & P System went into effect.

II. PROCEDURAL BACKGROUND

From 1985 to 1988, thirteen

individual employees at Buckeye's Flint River Plant filed twelve separate lawsuits against Buckeye. n5 All thirteen plaintiffs brought actions under 42 U.S.C. 1981 alleging racial discrimination in pay and in the terms and conditions of their employment. Appellants Ross and Porter also alleged discriminatory discharge in violation of 42 U.S.C. 1981. In addition, eleven of the plaintiffs -- all except appellants Rumph and Tyson -- brought actions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., based on complaints of discrimination they had filed with the Equal Employment Opportunity Commission (EEOC) in March, April, and May of 1985. All of the suits filed in districts other than the Middle District of Georgia were transferred to the Middle District. n6

On July 29, 1988, the District Court for the Middle District of Georgia consolidated for trial all of appellants' cases. Appellants' section 1981 claims were tried before a jury from September to December, 1988. On December 21, 1988, the jury returned verdicts regarding liability on these claims. The jury found in favor of Ross on his claim of discriminatory discharge and retaliation and on his claim

of discrimination in the terms and conditions of his employment. The jury found in favor of Plant on his claim of pay discrimination. The jury returned verdicts for Buckeye with respect to the remaining claims, thus denying all section 1981 relief for all appellants except Ross and Plant.

After hearing additional evidence on January 6, 1989, the jury returned damage verdicts as to the two prevailing plaintiffs. The jury awarded Ross $ 65,000.00 in back pay and $ 10,000.00 for lost benefits of employment. The jury awarded Plant $ 10,000.00 in back pay and $ 1,000.00 for lost benefits of employment.

On March 21, 1989, the district court entered final judgment on the disparate treatment claims under section 1981. Pursuant to this court's holding in Lincoln v. Board of Regents of Univ. System of Georgia, 697 F.2d 928, 934 (11th Cir.), cert. denied, 464 U.S. 826, 104 S. Ct. 97, 78 L. Ed. 2d 102 (1983) (in resolving Title VII disparate treatment claim, district court bound by jury's verdict on section 1981 claim), the district court's order also entered

judgment on appellants' Title VII disparate treatment claims. In addition to the jury verdict, the court awarded Ross and Plant interest on their back pay awards totaling $ 11,736.20 for Ross and $ 1,837.04 for Plant. The court also ordered Buckeye to reinstate Ross to his former position at the Flint River Plant. On April 10, 1989, the district court denied appellants' motion for new trial or judgment notwithstanding the verdicts on their unsuccessful disparate treatment claims.

The district court heard additional statistical testimony regarding appellants' Title VII disparate impact claims on May 1 and 2, 1989, and heard oral argument regarding disparate impact theory on June 27, 1989. On August 11, 1989, the court entered an order finding that appellants had established their claims of disparate impact by showing a causal connection between (1) an observed statistical disparity between the wages of Buckeye's black and white technicians and (2) the P & P System in effect at the Flint River Plant between 1982 and 1984. Buckeye I, 733 F. Supp. at 363 . However, the court rejected Porter's claim that Buckeye's "practice" of terminating

employees for absence and tardiness represented "a discreet [sic] employment practice or procedure as contemplated by the disparate impact theory of recovery" and, accordingly, declined to examine these termination policies. Id. at 347 (citation omitted). n7 On August 15, 1989, the court entered judgment on this order.

On April 2, 1990, the district court entered an order regarding Buckeye's liability to the eleven plaintiffs with Title VII disparate impact claims. Ross v. Buckeye Cellulose Corp., 733 F. Supp. 363 (M.D.Ga.1990) (" Buckeye II "). The court held that plaintiffs bore the burden of "establishing that they individually suffered injury as a result of [Buckeye's] discriminatory Pay and Progression System." Id. at 378. The court then found in favor of Herring, Homer, Palms, Plant, Ross, and Taylor, and against Porter, Putman, Scott, Slaughter, and White. Id. On April 16, 1990, the court entered judgment on this order.

On September 24, 1990, the district court held a hearing regarding damages for the six plaintiffs who prevailed on their disparate impact claims. On June 4, 1991,

the court entered an order awarding damages, prejudgment interest, and attorney's fees. Ross v. Buckeye Cellulose Corp., 764 F. Supp. 1543, 1554 (M.D.Ga.1991) (" Buckeye III "). n8 On June 28, 1991, the court entered judgment on this order.

On appeal, appellants argue that (1) the district courts in the Herring, Homer, Palms, Plant, Porter, Putman, Scott, Slaughter, Taylor, and White suits improperly changed venue to the Middle District of Georgia, (2) the trial court improperly excluded evidence that managers at the Flint River Plant were biased towards black employees, (3) the trial court erred in denying appellants' motion for directed verdicts or judgment notwithstanding the verdicts on their unsuccessful disparate treatment claims, (4) the trial court improperly limited closing arguments during the damages phase of the jury trial, (5) the trial court erred in rejecting Porter's claim that Buckeye's termination policy had a disparate impact on black technicians at the Flint River Plant, (6) the trial court erred in denying relief to Porter, Putman, Scott, Slaughter, and White based on disparate impact on black technicians'

pay, (7) the trial court failed to provide Herring, Homer, Palms, and Ross with adequate damages for their claims of disparate impact on black technicians' pay, (8) the trial court erred in failing to provide injunctive and equitable relief to remedy the effects of Buckeye's discriminatory pay system, and (9) the trial court's award of attorney's fees was insufficient. n9 Buckeye cross-appeals, arguing that (1) appellants' Title VII disparate impact claims challenging Buckeye's P & P System are time barred, (2) appellants failed to establish that Buckeye's P & P System had a disparate impact on black technicians, (3) the trial court erred in finding that the P & P System adversely affected Herring, Homer, Palms, Ross, and Taylor, (4) the trial court awarded excessive damages based on disparate impact for Palms, Plant, and Taylor, and (5) the trial court awarded an excessive amount of attorney's fees. n10 We note that Buckeye does not challenge the jury verdicts in favor of Ross and Plant on their section 1981 claims.

III. DISCUSSION

A. Venue

As an initial matter, appellants claim that the district courts in the Herring, Homer, Palms, Plant, Porter, Putman, Scott, Slaughter, Taylor, and White suits erred in transferring venue to the Middle District of Georgia. Appellants argue that the district courts failed to consider whether the Title VII venue provision conferred on appellants a right or privilege to choose the forum for their suit and stress that appellants "sought a forum other than the Middle District because of the historical antipathy towards Civil Rights cases shown in that district." Appellants' Brief at 153 (Nov. 6, 1991). n11 On appeal, this court will overturn a trial judge's ruling that a transfer is justified only upon a showing of "a clear abuse of discretion." Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 918, 102 S. Ct. 1775, 72 L. Ed. 2d 178 (1982); n12 see also Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1248 (11th Cir.1991).

We hold that appellants have failed to demonstrate that the district courts abused their discretion in transferring venue to the Middle District of Georgia. 28 U.S.C. 1404(a) provides that, "for the

convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In this case, it is undisputed that Buckeye's Flint River Plant and all employment records relevant to appellants' suits have, at all relevant times, been located within the Middle District of Georgia. In addition, it was reasonable for the district courts to assume that the overwhelming majority of the witnesses whose testimony might be relevant to the trial of appellants' claims resided in the Middle District of Georgia. Consequently, although it was proper for appellants initially to bring their Title VII suits in either the Northern or Southern District of Georgia, we hold that these courts did not abuse their discretion in transferring the suits to the Middle District of Georgia. n13

B. Jury Trial on Section 1981 Disparate Treatment Claims

1. Exclusion of Evidence of Flint River Plant Managers' Racial Prejudice

Appellants argue that the trial court erred in excluding evidence that managers

at the Flint River Plant had animosity towards black employees. According to appellants' offer of proof, a former Buckeye manager, James Hughes, would have testified that, while working at a Buckeye plant in Foley, Florida, managers who later worked at the Flint River Plant referred to their black technicians as "niggers" and put black employees in a group called "the bull gang," which was assigned "the dirtiest work in the plant." Record on Appeal, Vol. 35 at 5164. Hughes also would have testified that, while at the Foley Plant, Burt Richards, later the plant manager at Flint River who designed challenged portions of the P & P System, did whatever he could to get rid of black employees because he did not like having black people working for him. Id., Vol. 35 at 5165-66. Appellants assert that such testimony was relevant and probative on the issue of disparate treatment and, consequently, that the district court erred in excluding it. Appellants' Brief at 155.

We agree with appellants that evidence of "derogatory remarks indicative of a discriminatory attitude" are generally admissible to prove discriminatory treatment. Brown v.

Trustees of Boston University, 891 F.2d 337, 349 (1st Cir.1989), cert. denied, 496 U.S. 937, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990); see also Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1423 (7th Cir.1986) (in employment discrimination action, evidence that supervisor called blacks "niggers" was admissible to show supervisor's racial attitudes). In this case, appellants' argument on appeal suggests that Hughes' testimony might have been "smoking gun" evidence on the disparate treatment issue. In light of Buckeye's concession at oral argument that the managers may have made the alleged comments a mere three to five years before transferring to the Flint River Plant, we do not believe the fact the alleged comments were made at another plant significantly undercuts their probative value in this case. However, even if this court would have decided to admit the testimony at trial, on appeal, we will reverse a district court's ruling concerning the admissibility of evidence only on a clear showing of abuse of discretion. Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516, 1524 (11th Cir.1985).

Our review of the record convinces

us that the district court did not abuse its discretion in excluding Hughes' testimony. The district court based its decision on Federal Rule of Evidence 403, which permits the exclusion of relevant evidence "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial transcript shows that the district court was concerned that, since Hughes' testimony might have opened the door to further evidence regarding activity at the Foley Plant, admitting the testimony would unnecessarily prolong a trial that had already taken two months. Record on Appeal, Vol. 35 at 5167. In addition, the record shows that the district court believed that appellants had already presented "evidence that can give the Jury the total picture at the Flint River Plant," and, therefore, that Hughes' testimony was cumulative. Id., Vol. 35 at 5169.

We are persuaded that appellants' counsel failed to explain adequately to the district court the importance of this evidence. The district court clearly expressed its willingness to admit the evidence, even if it would substantially prolong the trial, if the evidence

appeared significant. Id., Vol. 35 at 5167. However, in response to this invitation to present a strong case for admission of Hughes' testimony, appellants' counsel merely stated that the evidence was important to impeach testimony that counsel had hoped, but failed, to elicit from Plant Manager Richards when Richards was previously on the witness stand. Id., Vol. 35 at 5170. Counsel never pointed out to the court that the evidence might be "smoking gun" evidence and did not otherwise highlight the significance of the evidence. After hearing counsel's argument, the district court indicated that, while it might allow the testimony for impeachment purposes, it would not permit it for the development of appellants' case. Id. On this record, we cannot say that the district court abused its discretion in excluding Hughes' testimony.

2. Denial of Motion for Directed Verdicts or J.N.O.V. on Appellants' Unsuccessful Disparate Treatment Claims

Appellants claim that the district court erred in denying their motion for directed verdicts or for judgment notwithstanding the verdicts on

appellants' unsuccessful claims of pay discrimination and on Porter's claim of discriminatory discharge. In reviewing the district court's disposition of a motion for directed verdict or for j.n.o.v., we employ the same standard of review as that used by the district court to determine whether to grant either motion. MacPherson v. University of Montevallo, 922 F.2d 766, 770 (11th Cir.1991). This court must:

> consider all of the evidence in the light most favorable to the nonmoving party and with all reasonable inferences drawn in favor of the nonmover. If the facts and inferences are so strong that the court believes that reasonable persons in the exercise of impartial judgment could not arrive at a contrary verdict, the district court properly grants a directed verdict or j.n.o.v. If, however, the evidence is such that "reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions," it is improper for the district court to grant a directed verdict or j.n.o.v.

Id. (citations omitted).

Appellants argue that they made out

a prima facie case of disparate treatment with respect to pay and that Buckeye failed to meet its burden to articulate a legitimate, nondiscriminatory reason for its actions. n14 See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-256, 101 S. Ct. 1089, 1094-95, 67 L. Ed. 2d 207 (1981) (describing burdens in Title VII suit); Morgan v. City of Jasper, 959 F.2d 1542, 1547-48 (11th Cir.1992) (same). However, appellants' concession that Buckeye presented evidence that individual appellants had "occasionally made operating errors, been late or absent from work, or shown character flaws," Appellants' Brief at 164, is fatal to their argument. Buckeye's introduction of evidence of these legitimate, nondiscriminatory reasons for its actions clearly satisfied Buckeye's burden of production. The Supreme Court has stressed that an employer "need not persuade the court that it was actually motivated by the proffered reasons." Burdine, 450 U.S. at 254, 101 S. Ct. at 1094 . Buckeye successfully rebutted the presumption of discrimination created by appellants' prima facie case when it presented evidence that "raised a genuine issue of fact as to whether it discriminated against [appellants]." Id.,

450 U.S. at 254, 101 S. Ct. at 1094 . Appellants then had the burden of demonstrating "that the proffered reason was not the true reason for the employment decision." Id. at 256, 101 S. Ct. at 1095 .

We cannot agree with appellants' assertion that, even if Buckeye met its burden of production, appellants conclusively demonstrated that any legitimate reasons Buckeye presented to explain its actions were pretexts. See Appellants' Brief at 165, 170. The transcript of the four-month trial of the discriminatory treatment issue is full of conflicting testimony regarding the motivations of Buckeye's decision-makers. The record makes it clear that any resolution of this issue involved difficult credibility judgments that are properly left to the jury hearing the evidence. Since we believe that reasonable and fairminded people in the exercise of impartial judgment might reach different conclusions regarding whether Buckeye had a discriminatory intent in making the decisions of which appellants complain, we hold that the district court did not err in denying appellants' motions for directed verdicts or j.n.o.v. on the

unsuccessful claims of pay discrimination and on Porter's claim of discriminatory discharge.

3. Closing Arguments to Jury

We review for an abuse of discretion appellants' claim that the district court improperly limited closing argument during the damages phase of the jury trial. See BankAtlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467, 1474 (11th Cir.1992), cert. denied, 113 S. Ct. 966 (1983). Appellants point to two instructions that they assert undercut their counsel's efforts to secure punitive damages for Plant and Ross, the two appellants who prevailed on their disparate treatment claims. First, the district court interrupted counsel's opening statement to the jury and instructed counsel not to refer to two alleged victims of discrimination who were not parties to this case. Record on Appeal, Vol. 64 at 9942. Second, the district court interrupted counsel's closing argument and instructed the jury not to consider evidence that Buckeye refused to reinstate Ross after the jury had found that Ross' discharge was discriminatory. Id., Vol. 64 at 9969,

9974.

After reviewing the trial transcript, we conclude that the district court did not abuse its discretion in limiting appellants' counsel's argument to the jury. The court prevented counsel from referring to the two alleged victims of discrimination because testimony regarding these two individuals had never been admitted into evidence. Id., Vol. 64 at 9942, 9988. As for the second intervention, the court did not allow counsel to refer to Buckeye's refusal to reinstate Ross as part of appellants' argument in favor of a punitive damages award because Buckeye was entitled to wait for the final judgment in Ross' suit to determine whether reinstatement or front pay would be the appropriate remedy. Id., Vol. 64 at 9970. Neither of the district court's interventions constituted an abuse of discretion.

Having rejected appellants' claims on appeal, we now turn to Buckeye's cross-appeal.

C. Disparate Impact of Buckeye's Pay and Progression System

1. Statute of Limitations

Section 706(e) of Title VII required that appellants file charges with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred" in order to sue Buckeye under the statute. 42 U.S.C. 2000e-5(e). n15 Buckeye argues that appellants' disparate impact claims challenging the P & P System at the Flint River Plant are time barred because the last allegedly discriminatory application of the P & P System to each appellant -- i.e., their last career plan assignment -- occurred more than 180 days prior to that appellant's filing of a charge with the EEOC. Appellee's Brief at 61-64 (Jan. 13, 1992). Appellants urge only two grounds for avoiding the time bar: continuing violation and equitable tolling. Appellants' Reply Brief at 8-11 (Feb. 21, 1992). Buckeye counters that appellants cannot maintain a theory of continuing violation. Appellee's Brief at 64-69. In addition, Buckeye claims that the district court erred in finding that the limitations period should be equitably tolled. Id. at 69-78.

We agree with Buckeye that appellants cannot maintain a theory of

continuing violation. This court in Beavers v. American Cast Iron Pipe Co., 975 F.2d 792 (11th Cir.1992), has very recently reiterated the appropriate continuing violation analysis. The court distinguished between the present consequences of a one-time violation, which does not extend the limitations period, and a continuation of a violation into the present, which does extend the limitations period. The Beavers court relied upon Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir.1980). n16 In Gonzalez, the plaintiffs mounted a challenge similar to appellants' challenge in this case. The Gonzalez plaintiffs alleged that the company used a discriminatory testing system, and that as a result plaintiffs had been denied promotion or transfer to better paying jobs. The Gonzalez court articulated the following analysis, which was quoted and adopted in Beavers:

> Where an employee charges an employer with continuously maintaining an illegal employment practice, he may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice. However,

> where the employer engaged in a discrete act of discrimination more than 180 days prior to the filing of a charge with the EEOC by the employee, allegations that the discriminatory act continues to adversely affect the employee or that the employer presently refuses to rectify its past violation will not satisfy the requirement of 42 U.S.C. 2000e-5(e) that the plaintiff file his charge of discrimination within 180 days of the discriminatory act.

Gonzalez, 610 F.2d at 249 (citations omitted), quoted in Beavers, 975 F.2d at 796. Applying that analysis, the Gonzalez court issued instructions for the district court to follow on remand:

> On remand the district court should determine whether Firestone continued to base its selection of employees to receive job opportunities upon scores from an unvalidated battery of tests. If Firestone ceased to utilize such a testing system more than 180 days prior to the filing of Gonzalez's charge with the EEOC, then his Title VII complaint would be barred for failure to comply with 42 U.S.C. 2000e-5(e) unless he could show either that Firestone's

> continuing to administer the test for the purpose of a validation study had a disparate effect upon the ability of Spanish-surnamed employees to obtain job opportunities or that Firestone denied him a promotion or transfer within the 180-day period on the basis of the prior testing. A failure to promote Gonzalez more than 180 days prior to the filing of his charge based on his prior test scores would not constitute a continuing violation.

Id. at 249-50. The Beavers court analyzed the Supreme Court precedent, including Lorance v. AT & T Technologies, Inc., 490 U.S. 900, 109 S. Ct. 2261, 104 L. Ed. 2d 961 (1989), Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986), and Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). n17 See also United Air Lines v. Evans, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977). Beavers concluded that the Supreme Court precedent "is entirely consistent with this court's traditional continuing violation analysis." 975 F.2d at 800. n18

In Beavers, the plaintiffs made a disparate impact challenge to the

company's policy of denying medical and dental insurance coverage to children of employees if those children did not reside full time with their employee-parent. The court applied the continuing violation analysis and concluded that the company's policy constituted a continuing violation. Although plaintiffs had first become subject to the policy long ago, the court held that the lack of coverage was not "merely the residual effect of a single discriminatory act occurring ... [at some] discrete point in time. Rather, it is the direct result of ongoing policy actively maintained by [the company]." Id. at 797.

The instant case is different from Beavers. In Beavers the challenged policy continued in operation. By contrast, in the instant case the challenged P & P System was not applied at any time within the limitations period. Because of the system-wide freeze imposed in October 1984, the P & P System in this case did not continue in operation. The allegedly discriminatory effects of the P & P System manifested themselves only on those periodic occasions when workers were evaluated for the purposes of assigning them career plans or modifying the plans previously assigned to them. In this

respect, the employment practice challenged in this case is very similar to that challenged in Gonzalez. The former Fifth Circuit held that a failure to promote Gonzalez more than 180 days before the EEOC charge was not a continuing violation, notwithstanding the obvious fact that the failure to promote had continuing consequences for employee pay. Similarly, in this case an application of the P & P System more than 180 days before the EEOC charge would be time barred. The Gonzalez court noted that there would be no continuing violation if "Firestone ceased to utilize ... [the] testing system more than 180 days prior to the filing" of the charge. 610 F.2d at 249. That is precisely what happened in this case, because of the 1984 freeze. On account of the freeze, none of the appellants had their career plans revised during the 180 days preceding the date that they filed charges with the EEOC. Indeed, appellants do not contend that the P & P System was applied to any appellant within the limitations period.

Apparently recognizing this fact, appellants have shifted their focus from the P & P System itself to the 1984 freeze, arguing that the freeze can be

challenged in its own right as a practice qualifying as a continuing Title VII violation. The district court accepted this argument, finding that the freeze "gave the [P & P] System 'a present legal significance'." Buckeye I, 733 F. Supp. at 356 . We disagree. Although the 1984 freeze locked into place the allegedly discriminatory effect yielded by prior applications of the P & P System, it was not itself discriminatory. Since the freeze locked every technician at the plant, regardless of race, into the then - existing compensation, we conclude that it represents just the type of neutral act that the relevant precedent has indicated is not a continuing violation, but is a mere continuing effect. Applying the continuing violation/continuing effects distinction, we must conclude that the 1984 freeze cannot qualify as an ongoing Title VII violation. Thus, we conclude that appellants cannot avoid the time bar by application of the continuing violation theory.

The final theory upon which the district court relied to find that appellants' claims were timely filed was that of equitable tolling of Title VII's timing requirements. Buckeye I, 733 F.

Supp. at 357 . In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S. Ct. 1127, 1132, 71 L. Ed. 2d 234 (1982), the Supreme Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court [under Title VII], but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Even before Zipes, this court had recognized that Title VII's timing requirements are subject to equitable tolling. See, e.g., Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1297-1302 (5th Cir.1979); Bickham v. Miller, 584 F.2d 736, 738 (5th Cir.1978); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir.1975); cf. Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 591-92 (5th Cir.1981) (en banc) (reviewing Fifth Circuit precedent on equitable tolling of Title VII's timing requirements). In Reeb, 516 F.2d at 931, the former Fifth Circuit held that Title VII's period for filing a timely charge of discrimination with the EEOC "did not begin to run ... until the facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a

reasonably prudent regard for his rights similarly situated to the plaintiff." See also Allen v. U.S. Steel Corp., 665 F.2d 689, 692 (5th Cir.1982). In the present case, the district court based its finding of equitable tolling on its determination that "certain necessary information [about Buckeye's P & P System] was not disseminated to technicians, which information, if known would have supported this Title VII cause of action...." Buckeye I, 733 F. Supp. at 357 .

After careful review of the record, we hold that the district court's finding of equitable tolling was clearly erroneous. Cf. Bickham, 584 F.2d at 738 (reviewing district court finding regarding equitable tolling under clearly erroneous standard). In order for equitable tolling to be justified in this case, the facts must show that, in the period more than 180 days prior to filing their complaints with the EEOC, appellants had no reason to believe that they were victims of unlawful discrimination. See Reeb, 516 F.2d at 930 (equitable tolling appropriate where, for six months, plaintiff had no reason to suspect that gender-based discrimination prompted termination). Even if appellants did not

know all the facts regarding the mechanisms of this discrimination (e.g., the details of Buckeye's P & P System), equitable tolling would be inappropriate if they were aware that Buckeye was violating their right to be free of racial discrimination in their employment. n19 Cf. McClinton v. Alabama By-Products Corp., 743 F.2d 1483, 1487 (11th Cir.1984) (no tolling of limitations period for Age Discrimination in Employment Act suit where plaintiff "suspects that he may have been discriminated against on account of age and is also generally aware of his legal right to obtain redress for that wrong").

Once Buckeye raised the limitations issue, n20 appellants bore the burden of proving that equitable tolling of the limitations period was appropriate. See Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992, 1010 (11th Cir.1982) (in Title VII action, plaintiff "bears the burden of proving that the conditions precedent, which the defendant has specifically joined in issue, have been satisfied"); cf. Bayer v. U.S. Dep't of Treasury, 294 U.S. App. D.C. 44, 956 F.2d 330, 333 (D.C.Cir.1992) (plaintiff alleging discrimination in federal employment has

burden of proving equitable reasons for failure to comply with Title VII's requirement that plaintiff proceed before agency charged with discrimination within 30 days of alleged Title VII violation). The trial transcript is devoid of evidence that appellants actually were -- or that similarly-situated people with a reasonably prudent regard for their rights would be -- unaware that they were victims of unlawful discrimination in the period more than 180 days prior to filing their complaints with the EEOC. On the contrary, the record contains anecdotal evidence of numerous confrontations in the early 1980's between individual appellants and management personnel over racial discrimination in rates of compensation, n21 the assignment of career plans, n22 Qualification Review Board results, n23 and discipline. n24 Based on this record, we conclude that the district court's finding that appellants established the extraordinary circumstances that justify equitable tolling was clearly erroneous.

Because appellants did not file charges of discrimination with the EEOC within the 180-day period and failed to establish grounds for equitable tolling, we hold that appellants' disparate impact

claims challenging the P & P System at the Flint River Plant are time barred.

2. Other Issues

Because we have determined that the disparate impact claims challenging Buckeye's P & P System are time barred, we do not address the other issues the parties have raised with respect to these claims. Furthermore, because our decision significantly alters the degree of success appellants have achieved in this litigation, we remand to the district court to determine the appropriate fee award.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgments awarding damages to Ross and Plant for disparate treatment and dismissing Porter's discharge claim of disparate impact. We also AFFIRM the challenged district court rulings regarding venue, the admissibility of evidence, appellants' motion for directed verdicts or judgment notwithstanding the verdicts on their unsuccessful disparate treatment claims, and closing arguments. We REVERSE the

district court's judgments finding that Buckeye's Pay and Progression System had a disparate impact on black technicians, assessing liability and awarding damages for this employment practice, and awarding attorney's fees. We REMAND for further proceedings in conformity with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

DISPOSITION

AFFIRMED in part, REVERSED in part, and REMANDED.

JUDGES FOOTNOTES

n* Hon. Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

OPINION FOOTNOTES

n1 Appellee's corporate name changed to Procter & Gamble Cellulose Corporation in the course of the

proceedings before the district court, but this opinion will refer to appellee as "Buckeye."

n2 A technician's "career plan" set out the particular "skill areas" (jobs within each unit of the plant's operations) in which the technician would train and the degree of proficiency to which the technician was to learn the skill. Technicians were assigned "primary," "cross," and/or "secondary" skills.

n3 The percentage of technicians that could receive any particular rank was limited.

n4 Although Buckeye's P & P System originally had only two pay curves, it eventually expanded the number of pay curves to six.

n5 On August 23, 1985, appellant Eddie Slaughter filed suit in the United States District Court for the Northern District of Georgia. On March 7, 1986, appellant Issiah Ross, Jr. filed suit in the United States District Court for the Middle District of Georgia. On December 19, 1986, appellants Tabitha Herring,

James C. Homer, Johnnie Lee Palms, Gerry Plant, William Morgan Porter, Vernon Alexander Putman, Franklin Roosevelt Scott, John W. Taylor, and Hosey J. White each filed a separate suit in the United States District Court for the Southern District of Georgia. On August 29, 1988, George Rumph and Nannette Tyson jointly filed suit in the United States District Court for the Middle District of Georgia.

n6 Slaughter's case was transferred from the Northern District of Georgia on January 8, 1986. On January 12, 1987, all of the cases filed in the Southern District of Georgia were transferred.

n7 The district court had previously granted summary judgment to Buckeye on a similar claim advanced by Ross. Id. at 346.

n8 The court awarded $ 17,510.00 in back pay plus prejudgment interest and profit sharing benefits totaling 47.146 shares of Buckeye common stock and $ 24.15 in cash to Herring; $ 13,759.00 in back pay plus prejudgment interest and profit sharing benefits totaling 37.149 shares of Buckeye common stock and $ 19.09 in cash to Homer; $ 31,982.00 in back pay plus

prejudgment interest and profit sharing benefits totaling 66.896 shares of Buckeye common stock, 1.388 shares of preferred stock, and $ 68.85 in cash to Palms; $ 23,760.00 in back pay plus prejudgment interest and profit sharing benefits totaling 85.100 shares of Buckeye common stock, 0.769 shares of preferred stock, and $ 63.37 in cash to Plant (less a $ 1,000.00 deduction from his profit sharing benefits); $ 21,971.00 in back pay plus prejudgment interest and profit sharing benefits totaling 54.410 shares of Buckeye common stock and $ 27.88 in cash to Ross; and $ 57,963.00 in back pay plus prejudgment interest and profit sharing benefits totaling 126.498 shares of Buckeye common stock, 3.572 shares of preferred stock, and $ 150.23 in cash to Taylor. Id. In calculating Plant's award of back pay and profit sharing, the district court subtracted the damage award he received under his 1981 claim. Id. at 1550. The district court also ordered Buckeye to pay a total of $ 175,794.10 in attorney's fees. Id. at 1554.

n9 Appellants' fifth claim has no merit and warrants no discussion. Claims six through eight are moot in light of our holding, see infra part III.C.1., that

appellants' Title VII disparate impact claims are time barred. With respect to Claim nine, appellants' arguments on appeal have no merit and warrant no discussion. Thus, this opinion will address only appellants' claims one through four.

n10 This opinion will address only Buckeye's first claim. Buckeye's claims two through four are moot in light of our disposition of its first claim. With respect to Buckeye's fifth claim, Buckeye's arguments on appeal are without merit and warrant no discussion; however, because all relief awarded by the district court on appellants' disparate impact claims is vacated by our holding, the case is remanded to the district court for a new determination of attorney's fees.

n11 Title VII's venue provision provides, in relevant part, that an action brought under Title VII "may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed...." 42 U.S.C. 2000e-5(f)(3). Since the alleged discrimination took place in Georgia, appellants were free to bring suit in any of the state's three federal judicial

districts. See Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1248 (11th Cir.1991).

n12 This case was decided prior to the close of business on September 30, 1981, and is binding precedent under Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981).

n13 Appellants have failed to convince this court that suits under Title VII lie outside the purview of the transfer clause of 28 U.S.C. 1404. See Lewis v. Madison County Bd. of Educ., 678 F. Supp. 1550, 1552 (M.D.Ala.1988) (Title VII venue provisions within purview of 28 U.S.C. 1404); cf. Richardson, 935 F.2d at 1248 (applying 28 U.S.C. 1404 to Title VII case).

n14 Appellants concede that Buckeye articulated a legitimate reason for firing Porter, his refusal to return to work after he was out on disability leave from January to July of 1986. Appellants' Brief at 169. We reject as frivolous appellants' suggestion that this reason was not "nondiscriminatory" on its face. See id.

n15 The amendment to this

subsection contained in the Civil Rights Act of 1991, Pub.L. No. 102-166, 112, 105 Stat. 1071, 1078-79 (redesignating existing text of 42 U.S.C. 2000e-5(e) as par. (1) and adding par. (2)), did not alter the time for filing of charges under the facts of this case, and, therefore, we need not address the question of the retroactive application of this amendment.

n16 This case was decided prior to the close of business on September 30, 1981, and is binding precedent under Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981).

n17 Appellants' reliance on Bazemore is misplaced. In Bazemore, the North Carolina Agricultural Extension Service had, prior to the enactment of Title VII, maintained racially-segregated branches and paid black employees less than white employees employed in the same positions. Although the Extension Service merged the two branches in 1965, it continued to pay black persons less than white persons employed in the same positions. 378 U.S. at 392-94, 106 S. Ct. at 3005. When the Extension Service continued after becoming subject to Title VII to pay black persons less than white

persons even though employed in the same positions, the Supreme Court held that that constituted a current act of discrimination. Id., 378 U.S. at 394-96, 106 S. Ct. at 3006. In Bazemore, the discriminatory acts continued. By contrast, in the instant case appellants have identified no discriminatory acts which occurred during the limitations period. The Supreme Court in Lorance distinguished Bazemore in the same manner. See Lorance, 490 U.S. at 912 n. 5, 109 S. Ct. at 2269 n. 5 ("A facially-discriminatory system (e.g., one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied.").

n18 Appellants argue that Lorance has no application outside the context or seniority systems. The Beavers court did emphasize that the central holdings of Lorance were limited to the context of seniority systems. However, with respect to the continuing violation analysis, the Beavers court expressly recognized that Lorance was "merely an application of the traditional distinction" between a continuing violation and the present consequences of a one-time past act of

discrimination. 975 F.2d at 799.

n19 We reject appellants' suggestion that the district court's finding of equitable tolling was correct since, prior to filing their complaints, appellants did not have all of the information necessary to prevail on their disparate impact claims. See Appellants' Supplemental Letter Brief at 7 (Aug. 17, 1992). The inquiry into whether equitable concerns justify tolling the limitations period focuses on whether appellants knew or reasonably should have known that Buckeye's P & P System operated in a discriminatory manner, not on whether appellants had enough evidence to prosecute successfully their disparate impact claims at trial. After all, once appellants finally brought their Title VII actions, they were able to take advantage of "liberal civil discovery rules [that] give plaintiffs broad access to employers' records in an effort to document their claims." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657, 109 S. Ct. 2115, 2125, 104 L. Ed. 2d 733 . Significantly, in this case, only after appellants filed complaints with the EEOC did Buckeye divulge any of the information -- the complete salary history of the Flint River

Plant employees, the assigned skill points, and the pay matrix -- that appellants now claim they would "have had to know to have realized that they had a cause of action for the disparate impact of [Buckeye's] Pay and Progression System on blacks as a group at the plant." Appellants' Supplemental Letter Brief at 7 (Aug. 14, 1992); see also Appellants' Supplemental Letter Reply Brief at 3-4 (Sept. 1, 1992).

n20 We reject appellants' argument that Buckeye waived the statute of limitations defense. Our review of the record, the briefs, and the supplemental briefs does not persuade us that Buckeye waived the defense. We note that Buckeye raised the limitations issue in its answer to each appellant's complaint. Appellants argue that a "Proposed Pretrial Order -- Jury Case" failed to include the statute of limitations as a defense, and thus Buckeye should be held to have waived the defense. We are not persuaded. The proposed pretrial order was not signed by either counsel or by the district judge. Although appellants represent that it was prepared in August, 1988, and was used as a guide during the September-December, 1988, jury trial on the 1981 claims, it

was not filed until September 9, 1992, at which time the district court permitted it to be filed nunc pro tunc to August 15, 1988. Significantly, the statute of limitations issue now before this court relates only to the disparate impact claim under Title VII, a claim which was not part of the September-December, 1988, jury trial. Indeed, the proposed pretrial order indicates in its title that it related to the then imminent jury trial; the title was "Proposed Pretrial Order -- Jury Case." Apparently, there was no pretrial order for the subsequent litigation of the disparate impact claim.

Even if we should assume arguendo that Buckeye waived the statute of limitations defense by its failure to specify it in the above-mentioned proposed pretrial order, our review of the record convinces us that appellants in turn waived their right to raise the waiver issue on appeal. On June 23, 1989, Buckeye filed a brief in which it urged the district court to find that appellants' disparate impact claims were barred by the statute of limitations. See Brief of Defendant Buckeye Cellulose Corporation Regarding Disparate Impact Issue, at 13-16 (June 23, 1989). Oral argument was heard

before the district judge on June 27, 1989. Apparently, appellants made no argument to the district court, either at the June 27, 1989, oral argument or at any subsequent time, that Buckeye had waived the statute of limitations defense. Indeed, appellants do not suggest in their briefs on appeal that they presented to the district court their argument that Buckeye had waived its statute of limitations defense. Rather, appellants argue that they should be excused because the district court at the June 27, 1989, oral argument indicated that no more briefs were needed. We are not persuaded that appellants should be excused. Appellants do not suggest that the district court forbade their raising the issue at the June 27, 1989, oral argument. Moreover, the district court did not absolutely forbid further briefing; rather, the district court indicated that it would not allow further briefing without special order. Appellants do not suggest that they requested permission to brief the waiver issue. The district court noted in its discussion of the statute of limitations issue on the merits that appellants had failed to respond to this issue. See Buckeye I, 733 F. Supp. at 356 . Since appellants failed to present to

the district court their argument that Buckeye waived the statute of limitations defense, we decline to entertain the argument which is presented for the first time on appeal.

n21 In 1983, Palms left his position as shift team coordinator because he was upset that he was being paid less than white technicians performing the same duties. Record on Appeal, Vol. 17 at 1205-09.

n22 In October of 1981, Slaughter complained to his manager that all the lowest paid positions in the wood yard were assigned to blacks. Supplemental Record on Appeal, Vol. 6, Tab 9 at 17-18. In 1983, Plant questioned his manager as to why black maintenance technicians were unable to have more skills added to their career plan. Record on Appeal, Vol. 13 at 424-25. On January 21, 1984, Ross went to see the Flint River Plant's Employee Relations Manager and complained that "black maintenance technicians were not allowed to cross train, while white technicians were allowed to cross train in process." Id., Vol. 36 at 5345; see also Exh. D-3 at 4.

n23 Following the administration of the Qualification Review Boards in 1982, Herring and Ross separately confronted their managers and expressed their belief that the qualification procedure discriminated against black employees. See Record on Appeal, Vol. 11 at 963-64 (Herring) & Vol. 36 at 5316 (Ross).

n24 In 1983, Scott complained to his manager that black employees were more harshly disciplined than their white counterparts. Record on Appeal, Vol. 22 at 2292-94.

APPENDIX B (BUCKEYE I)

ISSIAH ROSS JR., ET AL., PLAINTIFF,
vs.
BUCKEYE CELLULOSE CORP., DEFENDANT

CIV. No. 86-48-ALB/AMER(DF)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ALBANY/AMERICUS DIVISION

733 F. Supp. 344
August 11, 1989, Decided

COUNSEL

James Finkelstein, Albany, Georgia, for Plaintiff.

John G. Skinner, Smith, Currie & Hancock, Atlanta, Georgia, for Defendant.

JUDGES

Duross Fitzpatrick, United States District Judge.

AUTHOR: FITZPATRICK

OPINION

DUROSS FITZPATRICK, UNITED STATES DISTRICT JUDGE

These actions were tried before a jury for four months, from September 6, 1988 to January 6, 1989, on discrimination actions brought pursuant to 42 U.S.C. 1981. On December 21, 1988, the jury returned verdicts on the liability aspect of the cases, finding liability in only two instances: Plaintiffs Ross and Plant. After additional evidence on January 6, 1989, the jury returned damage verdicts as to the two prevailing Plaintiffs. The court entered final judgment on the Plaintiffs' section 1981 claims on March 21, 1989. Now before the court are the Title VII claims brought by eleven of the thirteen Plaintiffs. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq.

The Title VII claims of these Plaintiffs are premised on both the disparate treatment and the disparate impact theories of recovery. The court entered judgment on the individual disparate treatment claims of the Plaintiffs on March 21, 1989, pursuant to the Eleventh Circuit's holding in Lincoln

v. Board of Regents, 697 F.2d 928, 934 (11th Cir. 1983). n1 Regarding Plaintiffs' disparate impact theory of recovery, the court heard additional statistical testimony on May 1 and 2, 1989, and oral argument on June 27, 1989. Having carefully considered the entire record, the court sits prepared to rule on the remaining Title VII claims as set forth below in the court's Findings of Fact and Conclusions of Law.

Before the court embarks on this complicated history of the employment relations between Plaintiffs and Defendant, however, it must first address Defendant's Motion to Strike Portions of Plaintiffs' Proposed Findings of Fact and Conclusions of Law and Appendices. Defendant seeks to have this court strike certain portions of Plaintiffs' proposals on the grounds that: (1) Plaintiffs have identified a number of Defendant's employment practices never before questioned and not addressed by Defendant in its proposals; (2) certain of the Plaintiffs' arguments and appendices would require a reopening of the evidence which should not occur absent grounds which are not present here; and (3) Plaintiffs have attached certain documents as appendices

which are not admissible as evidence, represent summaries of various exhibits, and have not been cross-examined by Defendant. The court briefly addressed these contentions at oral argument and trial, and will now rule appropriately.

As to the employment practices being attacked by Plaintiffs, the court finds that Plaintiffs are questioning Defendant's entire Pay and Progression System (the System), including all of its various elements. In order to attack any particular element of the System, Plaintiffs must assail the entire process. Thus the court will not strike any arguments regarding the several components of Defendant's Pay and Progression System preliminarily. On May 26, 1988, the court issued its Order granting summary judgment to Defendant on Plaintiff Ross' discharge claim of disparate impact. In that Order the court ruled that Plaintiff Ross' termination for "inability to perform job" was not a specific employment practice subject to disparate impact attack. The court will not vacate that ruling. Thus Plaintiff Ross' termination claim will not be analyzed in the context of this Order. Plaintiff Porter also claims that Defendant's subjective system of

termination had a disparate impact on blacks. Specifically, Porter questions Defendant's 'practice' of terminating employees for "absence and tardiness." The court finds that this "practice" is, like "inability to perform job," a general categorization by an employer used to discharge various employees from different types of jobs, and is not a discreet employment practice or procedure such as contemplated by the disparate impact theory of recovery. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 108 S. Ct. 2777, 2785, 101 L. Ed. 2d 827 (1988). The termination policies of Defendant will not be examined here.

Defendant contends that Plaintiffs are attempting to reopen the record through their proposed Findings of Fact and Conclusions of Law by presenting new evidence and theories of recovery. This contention must be viewed in conjunction with Defendant's third ground for striking portions of Plaintiffs' proposals regarding the admissibility of certain of the documents appended thereto by Plaintiffs. As stated earlier, this Order will address Plaintiffs' disparate impact theory of recovery as it relates to Defendant's Pay and Progression System; no

other theory of recovery will be discussed. The court and Defendant have both long been aware of the essential subject matter of Plaintiffs' claims. Only through the presentation of evidence was Plaintiffs' theory able to take positive shape and definition. As the evidence developed, the court itself was able to grasp the particular policies and practices which contributed to the entirety of the Pay and Progression System. Because of the necessary place which each element of the System holds in relation to the overall outcome, the court is compelled to allow Plaintiffs to attack the whole System and, necessarily, each of its elements. In arguing this theory to the court, Plaintiffs are allowed to present charts, graphs, summaries, and appendices to further their arguments as well as attempt to aid the court with these documents. While the documents appended to Plaintiffs' proposed Findings of Fact and Conclusions of Law may not be admissible as evidence, the court will not strike them for that reason alone. This portion of the case is being heard by the court sitting without a jury, and this court is more that capable of separating fact from argument. Lest Defendant forgets, this court sat through the

entirety of the four month jury trial, ruling on each evidentiary question. The court is well aware of what was ruled admissible evidence. The court considers those documents attached as appendices to Plaintiffs' proposed findings of Fact and Conclusions of Law to be argument aids, designed to aid Plaintiffs' attorney in presenting the case, and the court in understanding. Accordingly, the court will proceed based upon the above rulings, by first setting out its Findings of Fact. These initial findings are simply a skeletal recitation of the facts in the case and the court will supplement them as necessary in its Conclusions of Law.

I. FINDINGS OF FACT

A. BUCKEYE'S FLINT RIVER PLANT

Plaintiffs in this action are all black, present or former, employees of Defendant Buckeye Cellulose Corporation. n2 Buckeye is an Ohio corporation and a wholly owned subsidiary of Procter & Gamble Paper Products Company (Procter & Gamble). Buckeye owns several plants in various states around the country including one in Macon County, Georgia, near Oglethorpe, known as the "Flint River

Plant" (the Plant). The Plant processes raw wood into heavy sheets of paper which are eventually sold to other Procter & Gamble subsidiaries to eventually be processed into the absorbent material used in disposable diapers.

The Plant is divided into essentially five (5) main working areas: Unit 1, the Woodyard area; Unit 2, the Pulping Unit; Unit 3, the Product Unit; Unit 4, the Powerhouse Unit; and Unit 5, Plant Maintenance Services. Each of these areas serves an integral function in the processing of the raw wood products. In addition to the five general areas, the Plant also contains a technical unit (the Central Laboratory); an administrative division; and a lands and timber section. In order to better understand the operations of the Plant a brief overview of the function of each of the relevant operating Units is necessary.

Unit 1, the Woodyard, is where the wood products first enter the Plant, either on rail cars or in trucks. The wood is processed into one inch chips which are conveyed to the Pulping Unit. The Waste and Water Treatment area is also a part of Unit 1. Waste and Water Treatment include

the processes by which the incoming and outgoing water for the entire Plant is chemically treated for use.

The Pulping Unit, Unit 2, is where the chips prepared in Unit 1 are put through a series of processes which separate the cellulose, the fibrous material, from the lignin and bleaches it into a white fiber.

The white fiber, or pulp, goes through a screening series in the Product Unit, Unit 3, to remove any remaining water. The pulp is then dried and rolled into large rolls, which are either stored in the warehouse, or placed directly onto trucks or rail cars for shipping.

Unit 5, Plant Maintenance Services, provides maintenance and support services to the entire Plant. Unit 5 consists of a welding and machine shop, vibration analysis, building maintenance, electrical and instrumentation (E & I), and a storeroom. Each of the other Units, however, employs maintenance personnel and, with the exception of the Woodyard, a group of E & I employees.

In 1979, Buckeye began preparations

for opening the Plant with Manager Al Eppinger. Buckeye hired a preliminary group of employees, approximately 40 persons, in December, 1979. This first hire group, known as "tech trainers," were responsible for learning the different jobs at the Plant in the various Units and developing the training program for those employees to be subsequently hired.

Buckeye began hiring the majority of its work force in the Summer of 1980. The new employees, called "technicians," n3 were hired in stages, with particular starting dates, either June 9, July 8, August 11, or September 9, 1980. In addition, there were two subsequent, smaller hire groups. The technicians were hired for positions as they became necessary for the operation of the Plant. Buckeye originally hired 450 employees and had a stated overall goal of hiring an employee pool consisting of 60% whites and 40% blacks, of which 20% would be female. Broken down by hire groups, only 20% of the tech trainers were black, the June hire group was approximately 30% black, 35% of the July hire group was black, and in August approximately 50% of the new hires were black. Eventually Buckeye reached its 60-40-20 goal. Upon hire, each

new employee went through an orientation process whereby he or she became familiar with the various operations of the Plant, the technician system, the Pay and Progression System, and Buckeye's multicultural organization concept. After the orientation period, each employee was allowed to state three preferences for a job assignment within those positions available to the particular hire group. n4 In making initial job assignments, Buckeye primarily considered three factors: individual preference, multicultural balance, and the company's needs. Within each Unit, the new hires went through a 3 to 6 month training period in which they learned their assigned jobs. Each Unit consisted of several teams which worked together as shift teams. Early in the Plant's operations, each Unit had 5 teams.

Initially, all of the technicians within a hire group were paid the same amount, $ 288.00 per week. At the 3 and 6 month periods of employment, each employee received uniform pay increases. At the end of nine months, each employee entered the career planning process, what was eventually to become the Pay and Progression System now under attack by

Plaintiffs. A "career plan" set out the particular skill areas in which the employee was to be trained and the degree of proficiency to which he or she was to learn the skill. By skills, Buckeye was referring to the various jobs within each Unit necessary for its operation; for example, Unit 1 consisted of mechanical maintenance, chip unloading, long wood -- short wood, waste/fuel, and waste and water treatment skill positions. Technicians were assigned "primary," "cross," and/or "secondary" skills. Buckeye claims that the intent behind the system was to allow the technicians to add to their skill base as they were able and as the Plant needs allowed. Buckeye established the Plant needs through the concept of an "ideal team skill mix." This ideal team skill mix designated the foreseeable Plant needs for 1 to 2 year periods by stating the number of particular skills needed to operate the Plant and the level of proficiency for each of those skills. Performance was supposedly a significant factor in determining the original career plans.

The career plan was a product of several elements. First, Buckeye conducted Plant-wide shift team meetings to explain

the system. The managers then gathered information about each technician's performance on the job. Each technician then met with his manager to discuss his performance level, and his or her interests, goals and expectations. Each technician completed an "Interest Form" to identify preferences for career plans. The Unit Management Team then met to evaluate the gathered information in conjunction with the employees' preferences and the "ideal skill mix." The Unit Management Team then assigned proposed career plans and submitted them for approval to the Pay and Progression Review Board. The Review Board either accepted or modified the proposed career plan for each employee and then assigned him or her to a pay curve level. A pay curve was, at that time, one of two pay levels on which a course of pay increases was charted in relation to the career plan and the timing intervals established by the plan. Once the career plans were approved by the Board, managers reviewed them with each technician.

Sometime in 1982, Buckeye modified the System by measuring the value of the various skill areas in relation to one another by assigning a point value to each skill. A numerical value was placed on

each of the primary, secondary, and cross skills by Plant Manager Burt Richards; for example, in Unit 1, the Woodyard, a technician received 10 points for a basic assignment in mechanical maintenance and 35 for a proficient, chip unloading technicians received 4 points for basic and 5 points for proficient assignments, technicians received 4 points when assigned a basic in long wood and 8 points for proficient, short wood skills were given 6 and 11 points for basic and proficient respectively, and waste treatment was assigned 6 points for basic and 12 points for proficient. These values were not divulged to any of the technicians or managers, though testimony at trial indicated that certain employees became aware of the point values, their significance, and the skills necessary to obtain a desired goal/pay level.

In addition, Buckeye instituted a ranking system whereby, initially, the Unit Management Team force-ranked each technician's performance and contribution on a scale of 1 to 5, with 1 being the lowest possible rating and 5 being the highest. Eventually, the technicians played a more active role in the ranking system. The ranking system operated such

that technicians were force-ranked, and the number of technicians which could be given any particular rank was limited, i.e., only 15% of the technicians could achieve the top rank of 5, no matter whether all technicians on a given team operated at the same level or were exceptional performers. The ranking system was almost totally a subjective program, with few, if any, standards to guide the managers.

When establishing a technician's pay curve, Buckeye primarily considered the career plans, the skills contained therein, and the points assigned to those skills. Buckeye's System considered all of the skills contained in the career plan, before they were acquired and whether or not they were ever acquired. The ranking system effected the pay of a technician only if the ranking was either above or below average, a 3 ranking, and then only, at most, by one pay curve. A variance in the pay curve was not automatic, even where the ranking varied from the average. Since the forced ranking system was based on a majority of the technicians being ranked at average, then, in practice, rankings had very little effect on the majority of the Plant's technicians. The

pay curve system was further complicated by the fact that Buckeye assigned each Unit an average pay curve rate which should be maintained within the Unit. These systems of averages and curves should have resulted in a bell curve-type result, Plant-wide, as well as within each Unit and team. In reaching a particular result regarding the ideal skill mix, the ranking average, the pay curve average, the skill needs of the Plant, the Unit and the team, and the ultimate assignment of skills, the Unit Management Team had almost complete autonomy.

In 1982, Buckeye began administering examinations to gauge the progress of each technician under his career plan. These examinations were called "Qualification Review Boards." The examination was oral and was conducted by a qualification board generally consisting of between three and five members. The early qualification boards were comprised solely of management personnel until sufficient technicians attained a proficient rating, thereby qualifying to serve on a qualification board. Subsequently, the boards were made up of the technician's immediate manager, one or two individuals selected by the technician

(another knowledgeable manager and a proficient technician), and up to two other management personnel. Buckeye prepared and distributed guideline questions to the qualification board members to consider asking during the examination, however, the board members were not bound by these questions and were free to ask the technician any relevant questions. The actual examination was not recorded, but the board members often made their own notes regarding the responses given by the technician. At the completion of the examination, the board member conferred with each other to reach a consensus as to the appropriate rating for the technician based upon both objective and subjective standards, i.e., the technician's performance during the examination, his observed on-the-job performance (including teamwork and leadership abilities), and the "gut feelings" of the board members. At the time in question here, the results of the Qualification Review Boards did not directly impact on the pay of a technician, however, they did impact on possible future career plan advancements. Buckeye established an appeals process available to technicians who were unhappy with their Qualification Review Board

results.

In 1982, after the first series of Qualification Review Boards had been administered to all technicians, a second career planning process took place similar to the first. Once again, Buckeye established an ideal skill mix for the Plant, each Unit, and each team. By this time the Plant operated with four instead of five shift teams, necessitating a reevaluation. Buckeye used this ideal skill mix to control the average pay curve within each Unit. The Pay and Progression Review Board, as before, had the final approval over the ideal skill mix for each Unit.

The career plans were then revised in a fashion similar to the earlier career plan system, keeping in mind the new ideal skill mix, the previous career plan, the results of each technician's Qualification Review Board, the technician's on-the-job performance, the desires of the technician, and the needs of the Plant, the Unit, and the team. As before, though, the Unit Management Team had practical autonomy in establishing the career plans, subject to final approval by the Pay and Progression Review Board and the

technician's right of appeal. However, in practicality, a manager's decision was seldom reversed. If a technician had not attained a certain level of proficiency in his Qualification Review Board, he was often not allowed to receive additional skills, and was at times not allowed to retain those on his first career plan. These second career plans also contained primary, secondary, and cross skills which were to be learned by the technician, and they were the essential ingredient in establishing a technician's pay curve. Thus the pay course of each technician, once established, was the basis for his entire pay history at Buckeye, and was a chief result of the fundamental elements of the Pay and Progression System which left a great deal of responsibility with the subjective decisions of the managers. This second round of career plans was the last Plant-wide reevaluation, though modifications to certain career plans did occur on individual bases.

Buckeye froze its entire Pay and Progression System in October of 1984 because of alleged low production, waning production quality, and high costs. Apparently the secondary and cross skill system had not worked as well as expected,

and valuable technicians were lost in continual training for these additional skills. Once the freeze became effective, technicians were reassigned to their primary skills and many of the problems which prompted the freeze improved. Though the pay freeze recognized the problems with the Pay and Progression System, especially the need for secondary and cross skills to move ahead, it did not attempt to erase all of these problems, especially in terms of pay and pay curves which were a result of this mad dash for additional skills to improve one's pay. As noted earlier, technicians continued to be paid for whatever additional skills were contained in their career plans, even after the freeze to remedy the additional skills problem and whether or not the skills were ever learned.

Since the 1984 freeze, Buckeye has attempted to modify and improve its Pay and Progression System with the input of technicians. This upgrade included the abandonment of the oral qualification examinations in favor of written examinations. The ranking system is now conducted by both the managers and the technicians based on a specific set of criteria, and a technician must maintain

a ranking equal to his pay curve in order to remain on that curve. Thus the new, more objective ranking system had a much more profound effect on the Pay and Progression System. Career plans have been renamed "skill blocks," and while they retain the numerical valuation system for skills and contain cross skills, they do not have the same aura of secrecy nor the impact of the previous career plans. The new Pay and Progression System has implemented a more objective and measurable method of evaluating a technician's performance, which eventually effects his pay.

B. STATISTICS

Since the aspect of these cases which this court must evaluate is the theory of recovery known as disparate impact, statistical evidence is extremely important. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). Statistical evidence was presented at trial by both parties through the testimony of two statisticians, Professor Jimmy Ramsey add Professor Charles Haweworth, as well as through the use of raw numbers regarding Plant employees.

Since the statistical aspect of the disparate impact analysis is relevant for the establishment of Plaintiffs' prima facie case, Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989), the court will analyze the statistical evidence from Plaintiffs' point of view, recognizing the differences between Plaintiffs' and Defendant's evidence when relevant. However, the court will first review the raw numbers and possible disparities visible and apparent to the statistically uneducated eye of the court, mindful of the approximate 60%/40% split in the Plant's work force between whites and blacks. In making these observations, the court will look primarily to the two extremes, the lowest and the highest, because Buckeye's goal at the Plant was essential based on reaching an average, thus presumably the middle ground is where the bulk of the employees would be found. Only by analyzing the extremes can the court get a true feel for what the numbers really mean and the success of Buckeye's "average" approach, as the court is aware of the deceptive nature of that word.

The mean/average weekly salary of all blacks, Plant-wide, as of December 31,

1985, was $ 534.00. The mean white weekly wage was $ 558.00. In Unit 1, the mean white salary was $ 544.00, while the mean/average black salary was $ 514.00.

Looking at the Unit 1 technicians in relation to the Pay and Progression System in effect from 1982 to 1984, n5 the average pay curve of white technicians was 3.1 and the average black pay curve was 2.5. The 48 white technicians averaged 36.1 points in their final career plans while the 36 black technicians averaged 29 points. Ranking effected only 29 of the 81 total technicians, raising 15 up a pay curve, and lowering 14. Of those 15 raised pay curves, 12 were white and only 3 were black, while 8 of the pay curve reductions effected blacks with only 6 whites being effected. The top 8 career plan point total positions were held by whites, as were 12 of the top 15 positions. On the lower end of the scale, 16 of the lowest 17 point total positions were occupied by blacks. As explained earlier, these point total positions were established by the skills contained in a technician's career plan, whether or not a technician ever actually learned all or any of the secondary or cross skills. These point totals were a direct result of the

subjective decision-making of the managers. By being placed in the above-related positions, certain technicians at the top of the scale could reasonably be assured that at no time in their Buckeye career would they ever be paid below a pay curve of 3, while certain of the lower point-totaled technicians could reasonably anticipate being paid no higher than on a pay curve 3 basis, both of these statements were true no matter how good or bad a job the technician did in the future. In looking at these numbers, the court is mindful that a technician's later growth at the Buckeye Plant was controlled in large part by the early career plans given them by their managers and the results of their initial Qualification Review Boards, because pay was primarily based on career plan point totals and managers were reluctant to upgrade or improve a technician's career plan before a certain level of proficiency was obtained, as judged by the qualification boards. Broken down by skills, of the 23 mechanical maintenance technicians in Unit 1, all 7 of the highest paid technicians were white, while all of the blacks were paid on the lower two pay curve scales. The top 9 career plan point totals belonged to whites, though 6 of the lowest

8 point totals were given to blacks. In the waste and water treatment skills 7 of the 8 highest paid technicians were white and 4 of the 5 lowest paid were black, out of a total of 13 technicians. White waste and water treatment technicians received the 6 highest career point totals and managers gave blacks 5 of the remaining lower point totals, including the three lowest.

Of a total 81 technicians in Unit 4, 22 of the 28 highest paid technicians were white while 10 of the 15 lowest paid were black. The average pay curve for whites was 3.5 and for blacks was 2.9. Technician rankings effected 15 whites positively and only 3 white negatively, 4 blacks were effected positively and 6 negatively. The average career plan point total for whites was 44.0 and 36.6 was the black average. Of the 62 process technicians, the average pay curve was 3.47 for whites and 3.0 for blacks; the rankings effected eight black technicians, four positively and four negatively, and whites were effected positively +7; the average career plan point totals were 43.1 for whites and 36.6 for blacks. In regard to the 1982 Qualification Review Boards, the top 8 mechanical maintenance results

belonged to whites, and 8 of the 10 lowest results belonged to blacks. Seven of the 8 highest paid mechanical maintenance technicians were white and 4 of the 6 lowest paid were black.

As far as Unit 2 is concerned, the data before the court is less extensive, but does reveal some information. Of the 22 mechanical maintenance technicians, 8 of the top 9 1982 Qualification Review Board results went to whites, and 6 of the 10 lowest results went to blacks. Whites were paid 7 of the top 9 salaries on curves 5 and 4 n6, while blacks were paid 8 of the 13 lowest salaries. Insofar as the career plan points were concerned, 8 of the highest point totals belonged to whites and blacks were given 6 of the 7 lowest totaled career plans by their managers. Within the oxygenation skill, of 9 technicians, the top 4 1982 Qualification Review Board scores went to whites and 3 of the bottom 5 scores went to blacks. The 4 highest totaling career plans belonged to whites and, of the remaining career plans, blacks received the two lowest.

The court wants to reiterate that these numbers are based on bare numerical

observations made by the court. However, they do aid the court immensely in now deciphering what can only be described as technically confusing statistical evidence provided by the parties' expert witnesses. The court heard extensive testimony from these witnesses during the actual jury trial of the section 1981 claims and again on May 1, 1989, and will now attempt to capsulize their conclusions. Plaintiffs rely upon the expertise of Professor Jimmy Ramsey of Albany State University. Professor Charles Haweworth testified in rebuttal for Defendant.

Professor Ramsey used a standard deviation test to discern the degree to which change might have contributed to the numerical differences between the salaries of whites and blacks at the Plant. The standard deviation is a measuring device for calculating "the likelihood that a given disparity occurred solely as a result of change." Maddox v. Claytor, 764 F.2d 1539, 1551 n. 13 (11th Cir. 1985). A statistician measures the deviation or disparity by comparing the actual salaries of the black employees to their "expected" salaries. For example, if ten technicians within a given skill of a given Unit are on pay curve 5 (the highest pay curve)

then the statistician will assume that 4 of those technicians would be black because the Plant's population was approximately 40% black. Correlatively, if 10 technicians were being paid on the lowest pay curve, the statistician would assume that 6 of those technicians would be white. If nine of the 10 top paid technicians were white and only 1 black, then the difference between the expected number of blacks and the actual number of places on pay curve 5 would be -3, with the negative symbol signifying an underrepresentation of blacks. This numerical disparity is then divided by the calculated standard deviation to arrive at the "Z-value" for the numerical disparity. "This Z-value is an index of random probability." Id. A Z-value of greater than 1.96 or less than -1.96 denotes that something other than chance probably caused the differential. The Z Standard Deviation Test (Z Test) is based on a bell curve shaped theory of probability. The shape of the curve is established by the intervals of frequency distribution, in our case the pay scales. The bell curve analysis is based on a normal or symmetrical distribution, i.e., the variable distribution consisted of 50% above and 50% below the mean. Professor

Ramsey used the Z Test to analyze the differences between the salaries of white and black technicians at the Buckeye Plant who were on the payroll as of December 31, 1985. n7 In his analysis, the Professor only sought to discover whether or not a significant difference existed between the given salaries of white and blacks at the Plant, and did not attempt to discover or consider any possible specific reasons for discerned disparities. Professor Ramsey first analyzed the salaries of technicians in Unit 1, the Woodyard. In 1980 and 1981 the Z-value of any disparity did not indicate any real significance between the salaries of whites and blacks, -1. 48 in 1980 and -1.549 in 1981. In 1982, the year of the first Qualification Review Boards and the second career planning stage, the deviation became significant, reaching -3.019 in 1982 and remaining below -3.0 until 1986. Using a 1985 Plant-wide comparison of black and white technician salaries, Professor Ramsey calculated the Z-value to be -5.74, indicating a significant disparity between the salaries of all white and all black technicians. n8

Professor Ramsey also calculated the Z-value of the technicians subdivided

by hire groups. n9 Addressing the December 3, 1979, hire group, Professor Ramsey discovered a Z-value disparity of -2.307 as of the salary date December 31, 1985. The Z-value differential for the July 7, 1980, hire group was calculated to be -3.019. The July 7 hire group consisted of 85 technicians, 40 black and 45 white. The September 8, 1980, hire group, consisting of 55 total hires (30 blacks, 25 whites), had a Z-value differential of -2.199. All 3 of these Z-values, being below -1.96, allegedly represent a significant inequality in salary between blacks and whites.

Attempting to rebut Plaintiffs' statistical evidence as presented by Professor Ramsey, Defendant relies upon the testimony of Dr. Charles Haweworth. Dr. Haweworth first explained that 3 methods for determining statistical probability exists: (1) binomial approximation; (2) Fisher's Exact; (3) conventional probability theory. He then explained the probability equation for a standard deviation. Standard deviation is equal to the square root of n times p times q, where n equals the pool of events, q equals the probability of a particular event occurring and p is equal

to 1-q, the probability of the event not occurring. Standard deviation represents an amount over or under probability. In addressing Professor Ramsey's analyses, Professor Haweworth indicated 4 problems with the calculations, 2 of which were technical and 2 of where were omissions. The technical problems were: (1) the data was not "normal" data; and (2) the statistical test administered by Dr. Ramsey was not valid. The 2 necessities omitted from Dr. Ramsey's calculations were: (1) hire date (length of service); and (2) prior training/experience.

Normal distribution is what many phenomena are, i.e. approximately the same distance above and below the average (a bell curve). Professor Haweworth then explained that the salary distribution at the Buckeye Plant was not symmetrical, in other words, the data was skewed. Specifically, while the white average at the plant was $ 558.00, the 1985 salary figures showed that 118 whites were being paid below the average and only 78 above the average. As to the blacks in 1985, only 46 were being paid below the black average while 95 black technicians had salaries above the black average. n10 The 1984 salary figures exhibited a similar

pattern. Dr. Haweworth testified that these numbers represented a skewed or abnormal distribution of variables and that accordingly a Z-value Standard Deviation Test was inappropriate under such circumstances.

Because of the allegedly skewed data, Professor Haweworth concluded that the appropriate means for calculating any disparity between white and black salaries at the Plant would be 1 of 3 methods: (1) mean or average; (2) median, the middle; or (3) mode, the most frequent value. Because of the skewedness of the relevant salary data, Professor Haweworth felt that the median was the most appropriate method, and showed the following: n11

	MEDIAN	
	BLACK	WHITE
1980	$ 288.00	$ 288.00
1981	$ 394.00	$ 394.00
1982	$ 452.00	$ 456.00
1983	$ 504.00	$ 512.00
1984	$ 542.00	$ 542.00
1985	$ 542.00	$ 542.00

This testimony shows that the

medians of black and white salaries at the Buckeye Plant were approximately equal, though in certain years the white median exceeded the black median of hundreds of technicians in a system based on average and white placed the bulk of its technicians in the middle salary ranges. Professor Haweworth's above-related explanation of abnormal or skewed data simultaneously explains his stated technical problem number 2, that the statistical tests used by Professor Ramsey were not valid.

In explaining the alleged omissions, Professor Haweworth stated that his analysis showed length of service to have a definite effect on technician salaries. In other words, he found a statistical relationship between salary and length of service at the Plant. As of 1985, the average length of service for whites was 65.9 months, and for blacks, 64.7 months. n12 In concluding that prior training was a necessary element in comparing the black and white technicians' salaries, Professor Haweworth analyzed the initial employment applications of all particular curve members in relation to the particular job being performed (skill area). For example, of the 34 technicians

on pay curve 5 (29 whites, 5 blacks), 12 were performing mechanically related jobs. n13 Of these 12 mechanical technicians, 6 had extensive mechanical experience prior to beginning work at Buckeye, 3 had related experience, and 2 had nothing to tie them to mechanics. n14

The thrust of Professor Haweworth's testimony was an attempted rebuttal or invalidation of the statistical evidence of Professor Ramsey. At this point the court will not discuss its conclusions as to the conflict between these expert opinions. Having set forth the relevant facts, the court now sits prepared to discuss and reach its conclusions of law. Since these facts, as stated earlier, are simply skeletal, the court will supplement them as necessary below.

III. CONCLUSIONS OF LAW

A. JURISDICTION

Plaintiffs brought their claims of disparate impact under the provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e et seq. Defendant contends that these claims are time barred pursuant to the

Supreme Court's recent holding in Lorance v. AT & T Technologies, Inc., 490 U.S. 900, 109 S. Ct. 2261, 104 L. Ed. 2d 961 (1989). Defendant argues that Plaintiffs are only complaining of the 1982 development of the Pay and Progressions System and not its implementation, and that accordingly Plaintiffs' charges were not timely filed with the Equal Employment Opportunity Commission (EEOC). Plaintiffs, for some reason, have not seen fit to respond to this contention; however, for several reasons the court cannot agree with Defendant.

Section 706(e) of Title VII requires that a "charge . . . shall be filed [with the EEOC] within [the prescribed time period] after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e). The prescribed time period for Plaintiffs' claims was 180 days. Defendant claims that since most of the Plaintiffs did not file any charges with the EEOC until 1985, two or three years after the development of the Pay and Progression System, they were not filed within the prescribed time period, are not cognizable by this court, and must be dismissed. Defendant points to the Lorance decision for the proposition that a

plaintiff cannot maintain a continuing violation theory of disparate impact resulting from the nondiscriminatory implementation of a system which supposedly had a discriminatory origin. The problem with this argument is that Lorance concerns an attack on a seniority system which is afforded special treatment by Title VII and the Supreme Court. See 42 U.S.C. 2000e-2(h); and Trans World Airlines v. Hardison, 432 U.S. 63, 81, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977). In order to maintain an action contesting a seniority system, a plaintiff must show intentional discrimination, which would naturally require reference to specific acts and events in time. The entire Lorance opinion is premised on the significance of the seniority system and cannot be applied in the situation before this court. The Lorance Court recognized the distinction between the seniority system there at issue and a normal claim of disparate impact in dismissing the contention that by not allowing a continuing violation challenge to seniority systems, the court must still allow plaintiffs to attack the system under a disparate impact theory. The Court apparently recognized that the very nature of a claim of disparate impact

contemplates continuing violations. Justice Scalia stated that for the purposes of disparate impact "the statute of limitations . . . [will] run from the time that impact is felt." Lorance, 490 U.S. at 908, 109 S. Ct. at 2267. The impact of the Pay and Progression System, if the court accepts Plaintiffs' contentions, is being felt even today at the Buckeye Plant. The Lorance Court's rejection of a continuing violation theory for seniority systems does not affect disparate impact claims against other types of practices and policies.

Even disregarding the seniority system distinction, the Lorance case holding does not require a dismissal of the claims now before this court. Justice Scalia cites the case of United Air Lines v. Evans, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977) , for holding that "[a] challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." Id. at 560, 97 S. Ct. at 1890 (emphasis added). This court cannot say that the Pay and

Progression System "has no present legal significance." As a result of the System-wide freeze in 1984, the effects of the system were locked into place and any possibility of remedying the situation was stalled. The 1984 freeze gave the System "a present legal significance." Thus, even under the Lorance seniority system rational, the court must hear Plaintiffs' claims, as they were timely filed within the prescribed time limitations.

Assuming arguendo that Lorance could bar these claims, Plaintiffs would still have one final argument. Certain extraordinary circumstances can justify a court's equitable tolling of Title VII timing requirements: (1) when a state court action is pending; (2) when the defendant conceals an act supporting the Title VII cause of action; or (3) when the defendant misled the complainant regarding the nature of his rights under Title VII. Manning v. Carlin, 786 F.2d 1108, 1109 (11th Cir. 1986). The court finds that the second extraordinary circumstance is applicable under the present facts and requires the court to equitably toll any timing deficiencies. Defendant admits that certain necessary information was not disseminated to technicians, which

information, if known, would have supported this Title VII cause of action, e.g., the various assigned skill points, the significance of the Qualification Review Boards and the rankings, the interrelationship of the different parts of the Pay and Progression System, etc. Accordingly, the court will equitably toll any timing inadequacies as to Plaintiffs' disparate impact claims. For the foregoing alternate grounds, the court finds that it has jurisdiction to address Plaintiffs' remaining Title VII claims based on a disparate impact theory of liability.

B. DISPARATE IMPACT

1. BURDENS OF PROOF AND PERSUASION

In the case of Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), the United States Supreme Court recognized the Title VII theory of recovery known as disparate impact, whereby an employee can challenge employment "practices that are fair in form but discriminatory in practice." Id. at 431, 91 S. Ct. at 853. Under the disparate impact theory, a facially neutral employment practice can be found violative of Title VII without a showing

of an employer's subjective intent to discriminate which is a necessary element of an individual "disparate treatment" case. The Supreme Court revisited the proof structure which had developed through case law regarding the disparate impact theory and redefined its parameters in the recent case of Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989).

Wards Cove involved Alaskan salmon canneries which hired unskilled cannery workers, most of whom were nonwhites, and noncannery workers, most of whom were higher paid whites. The cannery employees brought suit challenging the canneries' hiring/promotion practices under a disparate impact theory as causing a racial stratification of the canneries' work force because they denied nonwhites employment opportunities in noncannery positions. The Court of Appeals held that the plaintiff class had made out a prima facie case of discrimination and remanded the action for further findings regarding whether or not the employers could satisfy their burden of proving the challenged practices' business necessity. The Supreme Court first evaluated the Court of Appeals' definition of a prima facie case

and analyzed whether such had been established by the plaintiffs at the district court level. Specifically the Supreme Court addressed the statistical evidence and its significance to a prima facie case. The Court, after deciding that the statistical evidence was not sufficient, then announced the subsequent proof and evidentiary scheme to be used upon a finding of a prima facie case.

To establish a disparate impact prima facie case, a plaintiff has the initial "burden of showing a causal link between challenged employment practices and racial imbalance in the work force . . . " Id. at 658, 109 S. Ct. at 2125. Consequently, a plaintiff's disparate impact prima facie case must contain three elements: (1) articulation of a specific employment practice under attack, Watson, 487 U.S. at 994, 108 S. Ct. at 2788 ("[especially] in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests," as is this case in the present action); (2) a racial disparity, usually shown through statistical evidence, International Bhd. of Teamsters, supra; (3) a specific causal link between the challenged employment practice and the

statistical disparity. In discussing the statistical evidence necessary for the prima facie case, the Wards Cove Court made it clear that the comparisons must be relevant to similarly situated employees and the articulated practice, they must clearly indicate a racial stratification which is then shown to have been caused by a specific employment practice.

Once a prima facie case of discrimination is shown, the case then moves into what the Court called the "Business Justification" Stage, which

> contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact.

Wards Cove, 490 U.S. at 658, 109 S. Ct. at 2125. The ultimate issue in the "Business Justification" Stage is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. at 659, 109 S. Ct. 2125-26. In this Stage, the employer only bears a burden of production. The plaintiff has the ultimate burden of

persuasion on either of the alternative theories of recovery: (1) the employer's business justification; or (2) less racially significant available alternate practices. When analyzing the evidence in the Business Justification Stage, district courts are cautioned to remember that "[courts] are generally less competent than employers to restructure business," Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578, 98 S. Ct. 2943, 2950, 57 L. Ed. 2d 957 (1978). With this recently enunciated evidentiary scheme in mind, the court will now proceed to analyze Plaintiffs' disparate impact claims.

2. PRIMA FACIE CASE

Under Wards Cove, Plaintiffs must first establish a prima facie case by: (1) articulating a specific employment practice; (2) showing a racial disparity; and (3) demonstrating a casual connection between the specified employment practice and the racial disparity. In the present action, Plaintiffs point to Defendant's Pay and Progression System as the challenged employment practice. In attacking the System, Plaintiffs necessarily dispute its several components, i.e., the career plans, skill

points, the ranking system, Qualification Review Boards, the pay curves, and the 1984 freeze. The court finds that Plaintiffs have satisfied step 1 of their prima facie case. Wards Cove, 109 S. Ct. at 2124. The Pay and Progression System in operation at the Buckeye Plant until the 1984 freeze was an integral part of the Plant's function and was a definitive policy/practice of the company. The practically autonomous subjective authority given lower level management in carrying out the System makes it even more suspect. See Watson, supra. Having found that step 1 of the prima facie case has been satisfied, the court must now consider the statistical evidence presented by both parties.

Previously, the court meticulously described the relevant statistical evidence presented by the Parties' expert witnesses, Professors Ramsey and Haweworth. See infra., Part I.B. Plaintiffs rely not only upon the testimony of Dr. Ramsey, but on the raw number comparisons of the results of the Pay and Progression System, i.e., the high percentage of blacks in the lower realms of the career plan point totals, Qualification Review Board results,

rankings, and pay curves/salaries. Plaintiffs, while recognizing the impact of small variable pools on Z and T Test scores, also show that Defendant's expert recognized that if the Z or T Tests are appropriate, then the test results signify meaningful disparities between white and black salaries at the Plant. Plaintiffs argue that the test scores, though questionable, support the numerical disparities shown through percentages and raw numbers.

Defendant counters by first arguing that Plaintiffs' statistical evidence is not probative of a disparity because the comparison must be between similarly situated individuals, which Defendant contends Professor Ramsey did not consider. Under Defendant's theory, a Plant-wide analysis is not valid because the comparisons must be done on a Unit and skill area basis, i.e., statistical comparisons must be very narrowly drawn. Defendant relies upon the testimony of Professor Haweworth to show: (1) that Professor Ramsey's analysis was wrong; (2) the variable distribution was skewed; (3) another test should have been used; (4) that the standard deviation tests were inappropriate under circumstances of this

case; and (5) the proper test is to look at the medians, and upon comparing the medians one readily finds no discrimination. Finally, Defendant argues that Plaintiffs' statistics are useless because they do not consider any variables such as length of service, prior experience, training, etc. For the reasons set forth below, the court is convinced that a statistical disparity exists at the Buckeye Plant between black and white technicians in terms of pay.

The court will not regurgitate the statistical evidence as set forth previously, but will address Defendant's attacks on Plaintiffs expert witness and other statistical evidence. Regarding Defendant's first contention as to the scope of the comparisons, the court is not convinced that under the present situation narrowly drawn comparisons are absolutely necessary. All technicians, Plant-wide, were hired on a equal basis, were allegedly given equal opportunities and were given equal pay. The Buckeye Plant operated under a technician system, whereby employees learned primary, secondary and cross skills in order to facilitate a more efficiently run operation. Because of the technician

system, its function and operation, the court is convinced that Plant-wide analyses are relevant in a limited sense. Under Buckeye's system, all technicians are similarly situated individuals. Moreover, the statistical evidence is not limited to Plant-wide comparisons. As shown above, Plaintiffs and their expert presented some Unit comparisons as well as skill area comparisons. The statistical comparisons utilized by Plaintiffs were not only narrowly drawn for specific comparisons, but also provided a broader perspective of the entire plant.

Professor Ramsey used the Z-value standard deviation statistical analysis. Though the variable pools which he used were at times small, the test results convince the court that they are at least partially reliable. Professor Haweworth contends that the Z test is inappropriate because of the skewedness of the data. The court cannot agree. As stated earlier, the court finds that only through an analysis of extremes can we truly discern a meaning from numerical comparisons because of Buckeye's "average" approach and its deceptive nature. n15 Thus, the skewedness of the data, rather than being a detriment to Plaintiffs evidence,

further supports a statistical difference. Professor Ramsey's analysis is supportive of step 2 in Plaintiffs' prima facie case.

As to Professor Haweworth's testimony that other tests would have been more appropriate, the court, not being an expert in statistical analysis, will not second guess Professor Ramsey's choice of testing methods. The court recognizes that experts within any given field may differ in their opinions. While not choosing Professor Ramsey over Professor Haweworth, the court will give some deference to Plaintiffs' expert since Plaintiff does bear the burden of proof. Additionally, the median test suggested by Professor Haweworth contravenes the court's earlier finding that the more relevant information is to be found at the outer regions or extremes of a system based on averages.

Defendant's final argument concerns the consideration of variables. While the consideration of variables is important, the court is not convinced that Professor Ramsey's failure to specifically consider those factors delineated by Defendant defeats his statistical data. In many ways, the noted variables are considered because they are an integral part of

Buckeye's formula. Moreover, the purpose of step 2 of the disparate impact prima facie case is to simply show a statistical disparity, not to prove a causal connection. Some of the variables suggested by Defendant should not have made any significant difference. For example, all of the technicians were hired within an approximate 9 month time period, were paid the same salary, and were subsequently placed on career plan courses not particularly based on length of service as much as supposed ability. Training and prior experience may have contributed to salary and progression, but according to Defendant's own evidence, technicians were not always given their first choices of skill areas, the preferable jobs were filled early, and not all hires with prior experience in a particular area were placed in their areas of prior expertise. While other variables may be somewhat important, they do not defeat Plaintiffs' evidence, as oftentimes they were factored into the System, were not extremely important, or were not factors at all.

In analyzing Plaintiffs' statistical evidence, the court is mindful that "statistics are not irrefutable; they

come in infinite variety and, like other evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." International Bhd. of Teamsters, 431 U.S. at 340, 97 S. Ct. at 1856-57. Though Defendant did attempt to rebut Plaintiffs' evidence, it succeeded only partially. As stated earlier, the court is only relying on Professor Ramsey's testimony as supportive of the raw numbers, averages, and other relevant comparisons set forth infra. at Part I.B. Viewing Plaintiffs' expert's testimony together with the court's observations above and the anecdotal evidence at trial regarding the individual claims, see Kilgo v. Bowman Transportation, Inc., 789 F.2d 859 (11th Cir. 1986), the court finds that Plaintiffs have shown that a statistical disparity exists at the Buckeye Plant in regard to black and white salaries.

Step 3 of the prima facie case requires Plaintiffs to establish a causal connection between the contested employment practice and the apparent statistical disparity. Defendant can hardly dispute that the Pay and Progression System was the primary if not sole method of determining a technician's

salary. The career plans and point totals determined a technician's pay curve, in conjunction with the ranking system. For the purposes of Plaintiffs' prima facie case, the court finds that a causal connection existed between the exhibited racial disparity and the Pay and Progression System. Consequently, the court must now examine the evidence regarding the second stage of the Wards Cove disparate impact analysis, the Justification Stage.

3. BUSINESS JUSTIFICATION STAGE

Upon a prima facie showing of discrimination based on a disparate impact theory of recovery, the case moves into the second evidentiary stage known as the Business Justification Stage. Wards Cove, 109 S. Ct. at 2125. The eventual question in this examination concerns the extent that the challenged practice furthers the employers legitimate employment goals. Id. This Stage contains two alternative aspects: (1) the proffered business justification; and (2) available alternative practices. Id. If a plaintiff can persuade the court on either of these aspects of this Stage of the case, then he can recover.

a. Employer's Justification

In the first part of the Business Justification Stage,

> [the] touchstone of this inquiry is a reasoned review of the of the employer's justification for his use of the challenged practice.

Wards Cove, 490 U.S. at 659, 109 S. Ct. at 2126 . The practice need not be "essential" or "indispensable." Id. Thus the court must look at Defendant's propounded business justification, and Plaintiffs' counter-arguments and evidence regarding the pretext of such justification.

Defendant contends that the Pay and Progression System and its various elements serve the legitimate goals of the Buckeye Plant and its technician system. Defendant's intent and design in utilizing the technician system was to develop a multi-skilled, practically autonomous workforce which would ultimately benefit the company through increased productivity and reduced production costs. The system was also designed to benefit the

technicians through increased flexibility and higher pay. Buckeye's use of the technician system nation-wide had been shown to be successful. In setting up the Plant, Buckeye sought to incorporate the successful features of previous technician systems and avoid the less productive features. The ideal skill mix constituted the mix of skills ideally required to operate the Plant and support the technician principles. The Qualification Review Boards measured a technician's progress in his assigned skill areas. The skill point values were assigned to value particular skills and control costs. The career plan process broke job classification barriers and offered technicians broad job responsibilities in numerous skill areas and allowed them to contribute Plant-wide in a variety of ways. The career plans, in particular, contributed to the autonomous goals of the Buckeye Plant.

Plaintiffs' sole argument with regard to the particular business justifications specified by Defendant is that Plaintiffs somehow feel that Defendant has completely failed to advance any probative business interest such that would justify its use of the Pay and

Progression System as it operated prior to the 1984 freeze. In addition Plaintiffs contend that Defendant has not articulated a business justification for the 1984 freeze. Plaintiffs rely upon the Eleventh Circuit decision in Craig v. Alabama State University, 804 F.2d 682 (11th Cir. 1986). Craig stands for the proposition that in the absence of evidence advancing an employer's legitimate business justification, a court should not engage in a "common sense" drawing of inferences from the evidence in order to satisfy the defendant's burden. Id. at 690. Plaintiffs contend that for this court to find that Defendant has shown a legitimate business justification, it would necessarily have to engage in speculation to create the justification in the stead of hard evidence and articulated argument. The court cannot agree. Defendant presented ample evidence at trial regarding the technician system, its use at the Plant, its purposes and the reasons behind its use. Defendant's goal in using the Pay and Progression System was an ultimately autonomous Plant where any number of technicians were interchangeable without any variation in ability to run the Plant. Plaintiffs have the eventual burden of persuasion that they were denied

employment opportunities because of their race. Plaintiffs must persuade this court that Defendant had no legitimate business justification for the System. Wards Cove, 109 S. Ct. at 2126. Plaintiffs have failed in this burden. Their only argument, apparently, is that Defendant has failed to articulate and show a business interest. The court finds that Defendant has satisfied its burden of producing evidence, and that Plaintiffs have failed to persuade the court that Defendant's articulated reasons do not justify its use of the System. The court reaches this conclusion based upon the evidence and without speculation. Consequently, Defendant has prevailed on Part One of the Business Justification Stage of this case and the court must now move on to Part Two.

b. Available Alternative Practices

Though Plaintiffs have failed to persuade the court on Part One, they may still prevail by showing that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [interests] . . ." Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S. Ct. 2362,

2375, 45 L. Ed. 2d 280 (1975). By showing available alternative practices, the plaintiff would satisfy the core issue if the Business Justification Stage: whether the challenged practice was merely a 'pretext' for discrimination. Id. In evaluating the evidence at this Stage of the action, the court, as noted above, is reminded that it, in many instances, must bow to the business acumen of the employer. Furnco, supra. The present circumstances offer a very unique situation which the court must evaluate in terms of disparate impact, Wards Cove, and the effect of any possible remedy.

To satisfy their burden of proof as to available alternatives, the Plaintiffs primarily rely upon the fact that Defendant froze the old Pay and Progression System in 1984 and has subsequently instituted a new, less racially impacting, system. Defendant concedes that a freeze took place in 1984 and recognizes that the system now being utilized is not the old System, but Defendant contends the new system is simply a modification of that old System, which was never intended to be permanent. In addition Defendant argues that the modifications made to the old System were

minor alterations and that the System and its components, to a large extent, remain intact. Plaintiffs counter that the new system, though similar to the old, advances more objective policies with less racially disparaging effects. The court agrees with Plaintiffs.

In 1984, as a result of unstable Plant-wide operating costs and reliability, Buckeye froze the Pay and Progression System in order to maintain the status quo and restabilize. Once operations improved and at the urging of the technicians, a task force began investigating alternatives to the old System. As the task force worked, it conducted surveys to discern ideas and approval from management and technicians. Rather than implement an entirely new system, the task force decided that a modification of the old System would better serve the needs of the company. The new system contained many of the general elements of the old System, but provided for more technician input, and more objective standards and criteria. While technicians are still required to go through qualification procedures, the tests are now objective and written, technicians also have access to the tests.

Both managers and technicians rank employees against a specific set of criteria. Career plans are now known as "skill blocks." As before, skill areas are assigned a numerical value and the point total of a skill block determines the technician's pay curve. Upon implementation, however, no adjustments were made as to individual technicians regarding any discrepancies or disparities which resulted from the old System.

As to Defendant's contention that the new system is not an alternative system but simply the old System slightly modified, the court finds that the significance of the modifications in relation to this case make the present system a less racially impacting alternative practice. The modifications implemented by Defendant go to the very heart of Plaintiffs' complaints with the old System. Managers no longer have practical subjective autonomy, technicians have more input to the system, the standards and criteria are no more objective, and technicians now know and understand the system and how it works. The new system removes the secrecy of the old System and the almost sovereign managerial power of the old System, both

of which allowed much room for personal biases and prejudices.

The court is convinced that the new system contains the very type alternative practices contemplated by the Wards Cove Court. The problem now facing the court is that Wards Cove appears to contemplate a situation where suggested alternatives are rejected by the employer. 109 S. Ct. at 2126. Here, the proposed alternative has been implemented by Defendant. To now impose a remedy against Defendant would, in effect, punish Defendant for taking remedial measures. However, in instituting the new policies, Defendant did not adjust the pay and progression of the affected blacks to answer the racial disparities evidenced in Plaintiffs' prima facie case. Because the disparate effects of the old Pay and Progression System still linger at the Plant, the court finds that some type of remedy must be had. Plaintiffs have carried their burden of showing available alternative practices which have a less racially-disparate impact on blacks and the court must address the question of remedy.

c. Remedy

Since the new policy is now operating at the Plant, the court need not address the implementation of any alternative practices. The sole remedy now available is some method of erasing or equalizing the racial disparities caused by the old System. Because of the expertise within the industry required to address a remedy and because of the lack of sufficient evidence, the court will not, nor can it, decide an appropriate remedy at this time. A subsequent hearing will be held to discuss the remedy stage of this case.

III. CONCLUSION

As set forth above the court finds that Plaintiffs have established their claims of disparate impact against Defendant Buckeye. The issue of a remedy is reserved, pending further proceedings. Because of the implications of this Order and the extensiveness of any subsequent remedial stage of the case, the court also finds that "there is no reason for delay," Fed.R.Civ.P. 54(b) and directs the Clerk of court to enter judgment as to the liability aspects of these actions.

SO ORDERED, this 11 day of August,

1989.

OPINION

FOOTNOTES

n1 The Lincoln case stands for the proposition that a district court is bound by a jury's conclusions in individual claims of discrimination.

n2 Defendant's corporate name changed in the midst of trial to Procter & Gamble Cellulose Corporation, but for the purposes of this Order, Defendant will be referred to as "Buckeye."

n3 The term "technician" has no practical significance, nor does it relate to either the difficulty of the job to be performed or the education of the employee.

n4 As Buckeye began to hire in groups, certain jobs were either necessary for the start-up of the Plant or were preferred position. Thus these position were filled by the early hire groups and not available to the later hires.

n5 The court notes that during the period of time under scrutiny here the

work force at Buckeye was fluid, i.e., the technicians often moved from one Unit to another because of transfer or cross-training. As a result of this fluidity, the number of technicians within the Units varied. The court, however, will attempt to use total numbers when possible. Moreover, the court finds that any slight variation in numbers, about which Defendant might argue, is not relevant to the overall thrust of the numerical findings.

n6 At this juncture of the Plant's history, technicians were paid on one of 5 pay curves, with pay curve 1 containing the lowest salaries and pay curve 5 paying the highest.

n7 Professor Ramsey analyzed the salaries of all hourly wage earners at the Plant, excluding administrative and clerical personnel. He did not subdivide the technicians in job classifications on either a Plant-wide or Unit-by-Unit basis.

n8 The court finds this disparity of particular interest because, as both experts testified, the larger the sample size, the more accurate the calculation/analysis, and concomitantly,

the lower the number of variables, the less accurate the results. Professor Ramsey considers 10 to be a minimal number of sample variables for a reliable Z-value, but recognized that some statisticians might consider 30 to be the minimal number. A Plant-wide sample of all technicians is the largest sample under these circumstances. Defendant argues, however, that in order for any of these statistics to have meaning here, they must compare technicians within the same Units and the same skill area. Defendant further argues that because the Unit and skill area sample sizes would be small, then the Z Test is inappropriate for the purposes of this case. The court is troubled by these arguments for several reasons, and will consider all of the statistical evidence before reaching a final decision and discussing Defendant's contentions, infra, Part II, B, 2.

n9 Length of service is one factor which Defendant contends contributed to any pay disparity between blacks and whites, because, as stated earlier, the first hire groups were heavily white-populated and Buckeye only achieved its desired 60%/40% white-to-black ratio by having its last hire group composed of 50%

blacks.

n10 Professor Haweworth further testified that the average salary of Plaintiffs was $ 27.00 below the black average.

n11 As noted earlier, an analysis of the average or mean in regard to technician salaries at the Plant concerns the court because of Buckeye's quest for attaining averages both Plant-wide and by Units in regard to pay curves, career plan point totals, and rankings.

n12 Professor Haweworth prepared a series of documents to apparently show that length of service partially explains any disparities between black and white salaries. While the court understands this argument, it also notes that these documents consistently bear out the Plaintiffs' contentions regarding the top-heaviness of white salaries and the bottom-heaviness of black salaries, though, as pointed out by Professor Haweworth, the bulk of all salaries were in the middle of the salary range. Upon cross-examination, however, Professor Haweworth recognized Plaintiffs' contention. Moreover, Professor Ramsey's

hire group Z-values exhibit a significant disparity between blacks and whites within the same hire group.

n13 Though Professor Haweworth analyzed the job applications in relation to related prior experience, he did not look to see whether any technicians had prior experience/expertise in a particular area but had not been placed in a related skill position.

n14 Professor Haweworth also conducted T-value Standard Deviation Tests on the differences between black and white salaries. The T Test is similar to the Z Test, but is allegedly more accurate on smaller pools of variables. The Professor analyzed particular skill areas within each Unit; however, he also continued to contend that both the T and Z Tests were inappropriate because of the skewedness of the data. These Tests assume a normal distribution. Because Professor Haweworth relied so heavily on his contention that these Tests were unreliable, the court will not discuss his findings.

n15 See infra. p. 18 and n. 9.

EDITOR'S NOTE

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Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ISSIAH ROSS, JR., TABITHA HERRING, JAMES C. HOMER, JOHNNIE LEE PALMS, GERRY PLANT, WILLIAM MORGAN PORTER, VERNON ALEXANDER PUTMAN, GEORGE RUMPH, FRANKLIN ROOSEVELT SCOTT, EDDIE SLAUGHTER, JOHN W. TAYLOR, NANNETTE TYSON and HOSEY J. WHITE, JR.

Petitioners,

v.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

Volume II of II

APPENDIX to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX: LOWER COURT OPINIONS

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APPENDIX C (BUCKEYE II)

ISSIAH ROSS, JR., WILLIAM MORGAN PORTER, JOHNNIE LEE PALMS, JAMES C. HOMER, JOHN W. TAYLOR, VERNON ALEXANDER PUTMAN, HOSEY J. WHITE, JR., FRANKLIN ROOSEVELT SCOTT, GERRY PLANT, TABITHA HERRING, EDDIE SLAUGHTER, Plaintiffs,

vs.

BUCKEYE CELLULOSE CORP., Defendant

Civ. No. 86-048-ALB/AMER(DF)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ALBANY/AMERICUS DIVISION

733 F. Supp. 363

April 2, 1990, Decided

COUNSEL

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Mr. John G. Skinner, Smith, Currie & Hancock, Atlanta, Georgia, for Defendant.

JUDGES

Duross Fitzpatrick, United States District Judge.

AUTHOR: FITZPATRICK

OPINION

DUROSS FITZPATRICK, UNITED STATES DISTRICT JUDGE

In an order issued by the court in the above styled case on August 11, 1989, (herein referred to as Buckeye I), the court concluded that defendant's Pay and Progression System was a discriminatory employment practice that had a disparate impact on blacks employed at Buckeye Cellulose Corporation (Buckeye). The court will now supplement Buckeye I with the following individual findings of facts and conclusions of law concerning defendant's liability to the individual plaintiffs arising from their disparate impact claim. To the extent that any of the following findings of fact constitute conclusions of law, they are so adopted.

I. FINDINGS OF FACT

JOHN TAYLOR

John Taylor was hired by Buckeye on September 8, 1980, and initially assigned to work in the purchase chip area. The duties Taylor performed while working in the purchase chip area included unloading trucks and rail cars; weighing rail cars; and switching boxcars and chemical cars between the various units and buildings.

In 1981 Taylor met with Buckeye management to put together his career plan. Taylor requested a career plan in the areas of E & I (electrical and instrumentation), chip storage, chip prep, or waste and water. Taylor received a career plan that had chip unloading-proficient, waste fuel-basic, and electrical-basic 50%. He was placed on a curve two pay schedule. Taylor's career plan would remained unchanged until 1985.

In 1982, Taylor went through the qualification process in the purchase chip and waste fuel areas. Taylor got a fifty percent (50%) proficiency rating in the waste fuel area and a one hundred percent (100%) proficiency rating in the purchase chip area. Five years later, in 1987, Taylor became qualified in the waste fuel

area.

Buckeye's treatment of other technicians at the plant indicates that when assigning skill areas, Buckeye generally took advantage of the experience a prospective employee brought with him or her to the company. Ray Harth, a white technician at Buckeye, is an example of an employee who received credit for his previous work experience. Harth came to Buckeye with ten years of experience as a mechanic and was assigned to the mechanical maintenance area and placed on a curve five pay schedule.

Taylor, on the other hand, was not afforded the opportunity to take advantage of the skills he brought to Buckeye. Relying on his strong background as an electrician, Taylor made numerous requests to cross train or transfer into an area that would allow him to take advantage of his past electrical experience. However, he never had E & I placed in his career plan nor was he ever given the chance to formally cross train in E & I while at Buckeye. Don Kersey, a white employee who worked in the woodyard with Taylor, was allowed to shift over to E & I. At the time Kersey changed positions, Taylor had

over ten years of electrical experience and a state electricians license; Kersey had very little electrical experience and no experience in industrial and commercial electrical work.

An employee who started off at Buckeye in a similar position as Taylor was one Alvin Wellons, a white male. Wellons and Taylor both began in the purchase chip area with purchase chip in their initial career plan. Wellons, who was given the chance to cross train, had maintenance and waste and water skill areas added to his career plan. He was placed on a curve four pay level. Taylor was not allowed to cross train and wound up being placed on a curve two pay level.

Although Buckeye never did make formal arrangements for Taylor to cross train in E & I, the company did place electrical basic 50% in Taylor's career plan and gave him the chance to occasionally work in the electrical area and to assist E & I technicians at various times during shutdowns. Buckeye contends that by giving Taylor these opportunities to pick up training, Taylor suffered no harm by not being able to formally cross train in the E & I area. The court

concludes that the informal cross training is but one example of Buckeye's true assessment of Taylor as a valuable employee who had skills in the E & I area which Buckeye took advantage of without simultaneously reflecting that fact in Taylor's career plan.

On an employee record sheet dated 11/20/80 (def. ex. 99 at 4), Buckeye management personnel Tony Brightman and Charlie Wisekal state that they have reviewed Taylor's career plan and discussed ways that they might take advantage of his past electrical employment experience. They agreed that Taylor should spend time training with the E & I group. Upon being allowed to work in E & I, Taylor was specifically cited for doing a good job in E & I and providing valuable assistance to the team. After making the assessment that Taylor had the skills that would make him a valuable asset to the E & I team and that he should spend time training in E & I, Taylor received a career plan that did not include E & I nor was he ever allowed to formally cross train in E & I. He was given the skill of electrical, but only at a qualification level of 50% basic.

The evidence indicates that Taylor had the ability and the qualifications to work in E & I or at the very least deserved to have the skill added to his career plan as a cross skill. It is claimed by Buckeye that they ceased cross training in E & I, yet other technicians had it in their career plans and Buckeye admits Taylor informally cross trained in E & I. Buckeye appreciated Taylor's electrical experience and profited from it without compensating Taylor to the same extent as other white Buckeye technicians with comparable skills. It was through the use of Buckeye's discriminatory pay and progression system that they were able to do so.

The many talents Taylor had that Buckeye took advantage of do not coincide with Buckeye's placement of Taylor on a level two pay curve. The court has noted above Taylor's valuable electrical experience and Buckeye's use of it. The court also notes that Buckeye thought enough of Taylor to make him a shift team coordinator, although, it did later remove him from the position before shift team coordinator ever appeared in his career plan. Taylor assumed his role as shift team coordinator in 1981, around the same

time one Sonny Ard, a white male technician on a pay curve 5 level, also ascended to the position of shift team coordinator. Buckeye generally assigned the shift team coordinator position to technicians who were on a pay curve of at least three or better and only to exceptional technicians who could lead other team members. During the tenure of Taylor as shift team coordinator and that of his successor, Johnnie Lee Palms, shift team coordinators, other than Taylor and Palms, were the highest paid persons in their skill area.

In Taylor's case, Buckeye's own rating of Taylor's performance lends support to a finding that there was no legitimate business reason for Taylor not to be placed on a higher pay scale than curve two and consequently pay him more money. During the first few years of Taylor's employment at Buckeye, he received the type of appraisals that resulted in other technicians being placed on a pay curve higher than two. Taylor had a nine month appraisal in September of 1980 in which he was assessed as performing slightly above average. (Def. ex. 99 at 37). In August of 1982 Taylor received a performance appraisal

indicating he was doing an outstanding job. (Def. ex. 99 at 31). On that particular appraisal sheet Taylor received an above average rating in every one of the appraisal areas. In February of 1983 Taylor again received an assessment that indicated he was performing his job in an above average manner. (Def. ex. 99 at 30).

The court makes every attempt not to second guess the business decisions of the defendant. However, when defendant's own appraisals, compared to the appraisals of other similarly situated white technicians, indicates that based on the criteria it established, Taylor should have received a more valuable career plan and been placed on a higher curve; the court cannot help but reach the conclusion that Taylor has been treated unfairly.

Taylor has demonstrated that he has extensive electrical experience, which Buckeye does value, and that he had the qualifications and ability to be paid on a pay curve higher than two. On the other hand, Buckeye has not shown that it had a legitimate business reason for not placing Taylor on a higher pay curve. The court concludes that the only logical explanation as to why Taylor was not

allowed to cross train nor given a higher curve rating was because he was a victim of Buckeye's discriminatory Pay and Progression System.

TABITHA HERRING

Tabitha Herring, who was a member of the first hire group, began working at Buckeye on June 9, 1980. Herring started out with Buckeye in the waste and water treatment area. Herring was first trained in the water area which took approximately six months. Around ten months to a year after she had completed water training, Herring started her waste area treatment training. At her first qualification board meeting in 1982, Herring received a 50% proficiency rating in water and a 25% proficiency rating in waste. The actual qualification process that Herring went through amounted to her being asked a number of questions for a period that lasted approximately one hour and twenty minutes.

In 1984 Herring took another qualification test in which she received a 100% proficiency in water and a 75% proficiency in waste. Herring failed to get a 100% rating in waste despite having

worked in the area for four years without any incidents concerning environmental or turbidity problems. After each of Herring's qualification tests she was not told about any errors she made, no one went over any of her answers with her, and nobody explained to her why she had qualified at the rate and level she was assigned. Herring did not get another opportunity to take a qualification exam until 1987.

Although Herring did not officially cross train in mechanical maintenance, around the beginning of 1982, she took all the required courses in mechanical maintenance and passed every one of them. The classes she passed had to be successfully completed before a technician would be allowed to cross train in mechanical maintenance. Before being allowed to formally cross train however, Herring was informed that she would need to qualify 100% proficient in both waste and water before she could go on to maintenance. In 1987, Herring qualified as 100% proficient in both areas.

Unlike Herring, there were persons, both black and white, in the waste and water area who were permitted to formally

cross train before they got 100% proficient in both areas.

Only two other waste and water treatment technicians besides Herring had mechanical maintenance in their career plans; and of those two only Charlie Kare, a white male, was allowed to cross train while the other two individuals, Herring and Harold Hankerson, both black, never got the opportunity to cross train.

Herring argues that she was injured by defendant's discriminatory Pay and Progression System because she should have been paid a higher wage. According to Herring, one of the ways she was injured by the System was the unjustified removal of mechanical maintenance from her career plan.

Herring was originally placed on a curve three and given a career plan that included mechanical maintenance, which had one of the highest point values offered. In December of 1982, Herring had mechanical maintenance removed from her career plan which caused her to drop from a curve three pay level to a curve two. Defendant did not replace mechanical maintenance in Herring's career plan with

a skill of similar value.

Defendant produced a great deal of job performance evidence in hopes of demonstrating that it had a legitimate business reason for removing mechanical maintenance from Herring's career plan and placing her on pay level two. Much of that evidence was not considered because the court found it to be after the fact justification which did not affect defendant's decision to remove mechanical maintenance from Herring's plan and to place her on pay curve two. Defendant does concede that a change in the Pay and Progression System in 1982 was partially responsible for removing maintenance from technicians' career plans. It goes on to argue, however, that the removal of mechanical maintenance from Herring's plan was predicated on her slow progress in technical growth in her primary areas and lack of contribution. The court heard conflicting testimony concerning those allegations and finds that Herring's technical ability and contributions were no different than other similarly situated technicians who did not likewise have skills removed from their plans.

Another asserted reason for the

removal of mechanical maintenance from Herring's plan was defendant's assessment that Herring did not possess nor develop the technical skills necessary to adequately perform in the mechanical maintenance skill area. The court notes, however, that Herring took and passed all the courses in mechanical maintenance a technician was required to take and pass before being allowed to cross train in mechanical maintenance. Herring demonstrated that she has the ability and qualifications to train in mechanical maintenance.

The court is not convinced by the defendant's assertions that it had a legitimate business reason for removing mechanical maintenance from Herring's plan. Rather, the court finds that it was the effects of defendant's discriminatory Pay and Progression System that caused the removal and Herring's subsequent reduction in pay.

JOHNNIE LEE PALMS

Buckeye hired Palms on September 8, 1980, as a member of the last hire group and assigned him to work in the woodyard. During his orientation, Palms expressed a

preference to work in the woodyard unit. He was given an initial career plan in 1981 that included the skill areas of longwood, shortwood, and waste fuel. Palms began working primarily in the shortwood area but later requested a transfer from the shortwood area to waste and water treatment, which he felt was more in line with his educational and work experience. When Palms found out he could not transfer to waste and water because there were no openings in that area at the time, he requested the cross skill of mobile maintenance.

Palms never formally transferred from the shortwood area. However, he did get the chance to work in the waste and water treatment area. Palms was introduced to the waste and water treatment area in the latter part of 1981 where he picked up some training in waste treatment. He first went down to the waste and water treatment area for his cross skill training during the first quarter of 1984 before his 1984 qualification examination.

Palms began training in water treatment in February of 1986 and finished the training in January of 1988 when he was declared proficient in the area. On

his proficiency examination in 1988, Palms was assessed as 100% proficient in waste treatment and 100% proficient in water treatment. Before Palms received his proficiency, he was doing roughly the same job as technicians who were already proficient, such as white technicians Willard Parker, A.J. Niette, Lynn Barry, Jerry Barry, and a black technician named Tommy McCuller, who were all being paid more money than Palms.

A review of Palms' initial career plan shows that it called for him to become proficient in longwood and shortwood and to become basic in waste fuel and basic in waste treatment. Approximately a month after he received his career plan, Palms had shift team coordinator added to his career plan in October of 1981. The opening was created when John Taylor was removed from the position. Palms duties as shift team coordinator included: bringing the team together to initiate team meetings; lead discussions concerning performance results and maintenance problems; deciding on run strategies; and reporting to management the results of the team meeting and any other factors that had a possible impact on the operation of the woodyard.

As a shift team coordinator, in terms of the way Buckeye rated a technicians skills, Palms had a career plan equal to that of Sonny Ard and Joseph Willard Parker; and a higher rated plan than Alvin Wellons. However, Ard, Parker, and Wellons, all white technicians at Buckeye, were paid a higher salary than Palms. During the tenure of Palms as shift team coordinator and that of his predecessor, John Taylor, shift team coordinators, other than Palms and Taylor, were the highest paid persons in their skill area. Based on the evidence presented, the court concludes that there is no legitimate business reason that explains why Palms was not compensated similarly to the other shift team coordinators.

Buckeye clearly considered the shift team coordinator one of its top positions for technicians, evidenced by the fact that the position carried one of the highest point totals given for a support skill. The court concludes that Palms failure to receive a salary equal to that of the other shift team coordinators, Ard, Parker, and Wellons, can be attributed to defendant's discriminatory

Pay and Progression System which arbitrarily doled out career skills and allowed Buckeye management to have Palms perform on the same skill level as other similarly situated white technicians, but pay Palms less for doing it.

Palms asserts that there are other instances of his suffering injury because of defendant's discriminatory Pay and Progression System which occurred after he stepped down as shift team coordinator. When Palms gave up the shift team coordinator position in March of 1983, based on his belief that he was not being paid as much as the other shift team coordinators, he was told that his resignation from the shift team coordinator position would move him back a curve. Fifteen months later his pay curve was reduced from pay curve three to pay curve two. Palms said he contends that even without shift team coordinator in his career plan, his skills warranted placement on at least a pay curve three when you compared him to other equally qualified white Buckeye technicians.

Upon completion of his 1984 qualification examination, Palms received a rating of 100% proficient in longwood

and 75% proficient in shortwood. Palms, nevertheless, remained on a curve two pay level. Other white Buckeye technicians with lower qualification scores such as Tolbert Owens, who qualified at 50% proficient in longwood and 100% basic in wastefuel, and Harris Miller, who qualified at 50% proficient in longwood and 25% proficient in shortwood, were placed on a curve three pay level and paid more money than Palms.

Defendant has failed to convince the court that it had a legitimate business reason for not paying Palms on a pay curve three or better. Defendant's own proficiency scores of Palms, along with other evidence presented in this case, shows Palms to be a highly competent hard working technician who had the ability and qualifications to be a top performer in the longwood/shortwood area, although he was not paid as such. The court concludes that, even after Palms gave up his shift team coordinator position, the defendant has not produced a legitimate business reason for compensating Palms at a pay curve level lower than pay curve three. The fact that Palms was placed on a pay curve lower than three can be attributed to Buckeye's discriminatory Pay and

Progression System.

JAMES C. HOMER

James Homer was hired by Buckeye on July 7, 1980, and assigned to work in the pulping unit as a mechanical maintenance technician. In 1981, he received his initial career plan from Darrell Hart. The career plan Homer received listed only a basic in mechanical maintenance and had his pay curve level set at curve three.

Homer took his first qualification board examination in 1982 and was qualified as 100% basic in mechanical maintenance. When the new written qualification examinations were instituted at Buckeye, Homer obtained a qualification level in mechanical maintenance of 100% proficient unit wide and 100% proficient plant wide.

When he became 100% basic in mechanical maintenance following his 1982 qualification board examination, Homer still did not have any other skill areas added to his career plan. Homer specifically asked Buckeye management to add any type of cross training skill to his career plan. Homer's requests were

turned down despite the fact that there were other mechanical maintenance technicians in the same unit as Homer who had training skills in their plans, but were not actually undergoing the training.

In his position as a mechanical maintenance technician, Homer worked with and performed essentially the same tasks as white Buckeye technicians Herman Williams, Donald Ritch, Freddy Hogg, Joe Rogers, Haywood Jerkins, Tim Phelps, Charles Willis, Mickey Taylor, and Glenn Hair. However, Homer's pay was less than every one of those Buckeye technicians despite the fact that they all had the same job classification.

Defendant contends that Homer was paid less because he was not as skilled as the white technicians who received more money than Homer. Defendant's measure of Homer's skill level was primarily established through subjective qualification review boards, which were a component part of Buckeye's discriminatory Pay and Progression System. Defendant produced evidence which it asserted demonstrates that, it had a legitimate business reason for not including more skill areas in Homer's career plan and

placing him on a higher pay curve. The court finds that almost all of that evidence was after-the-fact justification which did not actually affect those decisions made by the defendant. The court further finds, after analyzing all reliable and credible evidence, that Homer had the qualifications to have additional skills placed in his career plan and to be placed on a higher pay curve; defendant did not have a legitimate reason for not doing so.

It is uncontested that the Pay and Progression System rewarded technicians according to the skills contained in their career plans. Buckeye technicians Williams, Ritch, Hogg, Rogers, Jerkins, Phelps, Willis, Taylor, and Hair received a higher wage than Homer because they had numerous skills placed in their career plans, unlike Homer whose original career plan only listed a basic in mechanical maintenance. Homer was told by his manager Hart that the reason he was being paid less than some of the other white maintenance technicians was due to his career plan.

Based on Homer's qualifications and defendant's failure to produce a

legitimate business reason for not putting additional skills in Homer's career plan and correspondingly placing him on a higher curve level, the court finds that, if not for the discriminatory Pay and Progression System, specifically the subjective manner in which Homer had skills placed in his career plan, Homer would have received a higher salary.

FRANKLIN SCOTT

Franklin Scott was hired by Buckeye on September 27, 1981, as a process technician in the pulping unit. Scott was in a hire group that began work at Buckeye approximately fourteen months after the majority of Buckeye technicians were hired. Scott expressed a preference to work in the power house unit or in process. He was told not to put down a preference in a particular skill area because that would be arranged for him once he arrived in the unit.

After being assigned to the pulping unit and going through about a week of orientation in the pulping unit, Scott was asked to indicate the areas in which he desired to work. Scott responded by listing digesting as his first choice.

Scott was eventually assigned to the O-2 (oxygen generation) area where he would work as an O-2 operator in the pulping unit. Scott's career plan issued in 1982 listed the O-2 skill area at a proficient level and his pay level was set at curve two.

Scott took his first qualification board examination in 1982 and received a 25% basic in O-2. Scott disputed the score he was given and on or around December 28, 1982, formally appealed the results reached by the qualification board. Scott's complaint was that the test was not standardized but rather a subjective test that one could not prepare for. It was subjective in Scott's opinion because there were methods and practices concerning the O-2 process that were still in the developing stage that had not yet been proven to work. Scott's appeal to change his score was not granted by the defendant.

In attempting to prove that he was injured by defendant's discriminatory Pay and Progression System, Scott compares himself to white technicians from his hire group and other O-2 technicians who Scott asserts he was just as qualified as

despite their being paid more than him. Scott has failed to convince the court that he possesses skills comparable to that group. Defendant presents convincing evidence that it had a legitimate business reason for paying Scott less than members of his hire group and the other O-2 technicians.

The court proceeds very carefully when examining evidence of Scott's job performance to determine whether it represents after-the-fact justification which actually failed to affect the critical decisions that resulted in Scott receiving less pay than members of his hire group and other O-2 technicians. In the case of Scott, there is uncontroverted evidence that he had problems performing his job in a satisfactory manner. Defendant could have, and evidently did, reach a decision very early in Scott's career with the company that he would at best be an average employee in whom the company should not invest a great deal of time and energy attempting to train in other skill areas. Scott contends that defendant's discriminatory Pay and Progression System caused him to be paid less than other similarly qualified white technicians because of his race. The court

finds that it was Scott's job performance that resulted in his lower salary.

HOSEY WHITE, JR.

Buckeye hired Hosey White, Jr. on July 7, 1980. White expressed a preference to work in unit one as his first choice and listed power house (unit four) as his second choice. White was given the position of mechanical maintenance technician and assigned to work in unit four. The specific area in unit four that White was to work in was the power blower area where he would be responsible for the air system and scoot blower. There were two other technicians, Mike Hutchings and Olin Hicks, initially assigned to the same area as White.

White attended training classes that lasted approximately three months. The classes covered a wide variety of areas and included hands on training. After the three month training period concluded, White was assigned to C team along with Clifton Locke, Loyce Clark and Olin Hicks. White started off working primarily with Loyce Clark until the two developed a strained relationship. White shortly thereafter requested a transfer

and was reassigned to A team where he was matched up with Jimmy Harrison.

White's first career plan gave him a basic in mechanical maintenance and placed him on a curve two pay scale where he currently remains. Before the career plan was issued by Chip Akin, White expressed his preference to Akin that he be assigned to the maintenance area and be allowed to get training in E & I, process, bark boiler, and power boiler. White and Akin discussed the degree of proficiency that White would attain in mechanical maintenance; after which White made the choice that his career plan should reflect only a basic in mechanical maintenance. White objected to having mechanical-proficient in his plan because he did not think he would be able to acquire that level while in unit four. After further discussions concerning White's career plan, White and Akin agreed that the E & I skill area in his plan would be too difficult for White to attain, so White agreed to a career plan that called for mechanical maintenance and bark boiler. White never did cross train in bark boiler and his career plan summary does not indicate that it was part of his career plan. White asked Akin if he could cross

train in welding and was turned down, although, Akin sent four white mechanical maintenance technicians, Loyce Clark, Terrell Edalgo, John Mays, and Calvin Benny Moore, to train in welding.

White has failed to convince the court that he was paid less than any similarly qualified white Buckeye technician on account of defendant's discriminatory Pay and Progression System. Defendant had a legitimate business reason for fashioning White's career plan the way it did and for paying him on a curve two level. Early in his career, White exhibited difficulty performing the technical assignments mechanical maintenance technicians often encountered. He, along with fellow mechanical maintenance technicians John Mays and Benny Moore, was one of the worst offenders when it came to completing work schedules. It was White himself who rated his skill level at basic rather than proficient. He has not demonstrated that he was qualified to be paid on a pay curve higher than two. The court has found no evidence to show that, absent the discriminatory Pay and Progression System, White would have received any different compensation nor that, while the System

was in place, he was held back or paid less than white technician with skills comparable to his.

VERNON ALEXANDER PUTMAN

Buckeye hired Vernon Alexander Putman on July 7, 1980, as part of its July hire group. Putman indicated to Buckeye, when asked, that he would prefer working in the powerhouse unit. Putman was assigned to the powerhouse unit to work as a mechanical maintenance technician. He first began working with B team which was comprised of himself and Barbara Key. In the latter part of 1982 Putman was reassigned to A team where he worked with John Mays.

In early 1982 Putman had his initial qualification board examination. Putman's examination was given orally. He was not told what he would be tested on before hand nor were any of his answers discussed with him after the test was completed. Putman originally received a 50% basic that was changed the next day to a 75% basic, after Putman spoke with his manager Steve Pender. Putman did eventually qualify 100% basic in 1983. Putman is now rated at 50% proficient but

has not yet qualified under the new system that replaced the old Pay and Progression System.

Putman's first career plan had him listed as having a basic in mechanical maintenance. He was placed on a curve two pay level where he currently remains, although a Buckeye manager, Frank Dennis Hooper, did wonder why Putman was not ranked on curve three. Putman's second career plan had a basic in either recovery boiler or evaporators. Putman never did cross train in either of those, or any other areas. Some of his fellow white mechanical maintenance technicians did have the opportunity to cross train; Jimmy Harrison cross trained in calcining, Olin Hicks cross trained on the bark boiler, Terrell Edalgo cross trained on evaporators, and John Mays had the opportunity to cross train in calcining. Bennie Moore, Loyce Clark, John Mays, and Terrell Edalgo all had the opportunity to go to the welding area.

Putman had the same career plan as Randall Washington, a white mechanical maintenance technician, but Putman was ranked on a curve two while Washington had a curve three ranking. Putman believes he

has been treated unfairly when compared to Randall Washington and also when compared to Patty Mason and Terrell Edalgo. The court has determined from the evidence that Putman was not as qualified as those individuals. Putman was a hard working competent mechanic. However, much like Hosey White, his mechanical maintenance skills were not comparable to most of the other Buckeye mechanical maintenance technicians both black and white. Putman performed his job at a basic level and as such defendant has demonstrated that it had a legitimate reason for paying Putman on pay curve level two. Putman suffered no adverse effect because of Buckeye's discriminatory Pay and Progression System. The court is convinced that no matter what kind of employee advancement system was incorporated at Buckeye, Putman's salary and position would not have changed.

GERRY PLANT

Gerry Plant was hired by Buckeye on June 9, 1980. At the time he was hired, Plant expressed a preference to work in maintenance and did in fact receive an assignment to work as a mechanical maintenance technician in the woodyard. He

was placed on a curve three pay scale.

Plant's original career plan listed mechanical maintenance at a proficiency level. In 1984 Plant was issued a new career plan that had mechanical maintenance-proficient and administrative coordinator. Plant had asked to have machinist, unit five building maintenance, welding, and process skill areas included in his career plan, but did not get any of those skill areas placed in his plan. Other Buckeye mechanical maintenance technicians, including Allen Massey, Ray Harth, Roy Peterson, Doug Johnson, Debbie Hearn, Chuck Whaley, Bill Chester, Wayne Tharpe, and Robert White, had cross skills placed in their career plans in 1981.

Plant was concerned that when he first began with Buckeye he was not receiving the job assignments that required the application of technical mechanical skills. He also talked to management about what he perceived to be a situation where blacks in his unit were not being allowed to cross train and were being kept on the lower pay curves by not having cross skills put into their career plans. The evidence presented in this case indicates that very few, if any, blacks in

unit one mechanical maintenance had cross skills placed in their career plans prior to 1984.

As time went by, Plant developed an expertise in working on the sludge press, the chipper, the fulghum cranes, the bark hog, the chip hog, the stacker, and the reclaimer. He gained a reputation as being one of Buckeye's better employees who was an excellent mechanic on the chipper.

By June 6, 1983, Plant had moved up the pay steps on pay curve three to the point that he had gotten all the pay raises that one could get while on curve three. At that point, the only way Plant could have received a pay raise would have been for him to have items added to his career plan so that he would move up to a new pay curve. Many white employees had likewise topped out on their particular curve level. Near the end of 1984, Buckeye's Pay and Progression System was put on hold and there were no more curve changes. Employees were allowed, however, to continue advancing within their curve level.

The qualification examinations, career plans, and the resulting curve

level assignments, all component parts of defendant's Pay and Progression System, clearly had a negative impact on Plant. Plant was recognized as one of the better maintenance technicians. However, on his first qualification board examination in 1982, he received a score that at first appeared to be a 25% proficient, but ended up being written on his qualification form as 100% basic. On the mechanical maintenance qualification board examinations administered by Buckeye in 1982, Plant and all other black mechanical maintenance technicians failed to get a rating higher than basic; the white mechanical maintenance technicians originally assigned to the same group as Plant received ratings no lower than proficient. In 1987, after the old Pay and Progression System had been replaced, Plant achieved a 100% proficiency rating in mechanical maintenance.

The evidence presented by Plant demonstrates that his mechanical maintenance ability was equal to or better than similarly situated white mechanical maintenance technicians who were placed on a higher pay curve than Plant. Examples include the placement of Chuck Whaley, a white technician given only a 50%

proficiency in woodyard maintenance, on curve four pay level; the placement of Bill Chester, a white technician given only a 25% proficiency in woodyard maintenance, on a curve four; and the placement of Deborah Hearn, a white technician given only a 100% basic score, on a curve four. Their placement on curve four occurred at a time when Plant had qualified as 75% proficient in woodyard mechanical maintenance and was being paid on a curve three pay level.

Although defendant produced evidence which it asserted demonstrated that it had a legitimate business reason for paying Plant the salary he was paid, the court finds that much of that evidence was after-the-fact justification which did not affect defendant's decision to place Plant on a curve level three. The remaining evidence amounted to nominal criticism which fails to provide a clear explanation for Plant's failure to be placed on a curve higher than three.

Accordingly, the court finds that defendant did not have a legitimate business reason for not placing Plant on a pay curve higher than three. Furthermore, the failure of Plant to be placed on a

curve higher than three occurred as a result of Buckeye's discriminatory Pay and Progression System.

WILLIAM PORTER

William Porter started working for Buckeye on December 3, 1979, as a technical trainer in the Woodyard. His job entailed developing training programs in the longwood and shortwood area for the incoming technicians. Porter had hoped he would be assigned a mechanical maintenance position. However, despite years of prior experience as a mechanic, Buckeye chose not to make Porter a mechanical maintenance technician. Instead, Buckeye made a legitimate business decision that, with his three years prior experience in the logging business, Porter would be of more value to the company working in the longwood/shortwood area.

On his career plan dated November, 1982, Porter was assigned the skills of longwood-proficient, shortwood-proficient, and water-proficient. Porter's second career plan contained longwood-proficient, shortwood-proficient, water-basic, mobile maintenance-basic, and placed Porter on a curve three pay level.

After Porter completed an initial six week period of training technicians, he performed follow-up training, updated training programs, and trained technicians on new equipment. Porter carried out his duties primarily in the longwood and shortwood area of the woodyard, although he did do some work in water treatment and worked in mobile maintenance multiskilling.

In the early part of 1981 Porter took his first qualification board examination. Porter's qualification board examination covered longwood and shortwood. The result of Porter's examination was that he received a 100% proficient in longwood and shortwood. Sometime in 1983, Porter took another qualification board exam in water treatment. On his water treatment qualification Porter was rated at 50% proficient.

On December 16, 1985, Porter received a rating of 100% basic in mobile maintenance. He did not go before a qualification board to receive the mobile maintenance rating, but rather answered some questions posed by the maintenance

manager George Palms, who decided Porter should get the 100% basic rating. Despite being given only a basic in mechanical maintenance, Porter wrote the preventative maintenance plan for the Terex, a large bulldozer, which other P.M. formats were modeled after.

Porter's work in the shortwood and longwood areas caused him to be exposed to poison ivy and poison oak which triggered an allergic reaction in him. Porter had medication he would take, however, the company did not want him to take the medication while he was at work because it caused him to get drowsy and become unable to perform his job safely. Porter asked that this problem be solved by allowing him to work in the water treatment areas and mobile maintenance. Buckeye made an effort to accommodate Porter's request by assigning him, as much as possible, to those areas during the summer months when the poison ivy and poison oak were most prevalent. In another attempt to solve Porter's allergy problem, Buckeye offered to transfer Porter to the waste and water treatment area or certain other units. Porter declined the invitation, expressing his desire not to leave the woodyard unit nor work exclusively in waste and water.

The area Porter wanted to work in was mechanical maintenance. He made repeated requests to transfer into that area. Although his requests to transfer were turned down, Porter did spend about a year in mobile maintenance cross training and approximately six months in waste and water working in water treatment. Other unit one white technicians, Lynn West Barry, Charlie Kare, and Randy Lawhorn, were allowed to transfer into mechanical maintenance. Willie Keen, a black technician, who worked in the waste fuel area was also allowed to transfer into maintenance on a full time basis.

Porter had outstanding technical skills and encountered few problems actually performing his assigned tasks. However, Porter had a serious attendance problem that ultimately cost him his job with Buckeye. It was a problem that extended throughout Porter's employment at Buckeye. The evidence presented demonstrates countless incidents of Porter's unauthorized tardiness or absences from work.

Porter was made aware of the fact that his chronic absenteeism had an effect

on his job rating. Porter received a three day suspension in August of 1983 because of what his manager, George Palms, described as dishonesty and inadequate communication regarding tardiness from work. In a note to the file prepared by Palms on Porter's return to work, Porter was reminded that he stood a good chance of being fired if he was involved in any further unacceptable work standards violations.

After another unauthorized absence from work, Palms, in a memorandum dated February 20, 1984, again informed Porter that he continued to seriously jeopardize his employment due to excessive lost work time. On May 10, 1984, Porter called his manager Bryant Orr, and told him he would not be able to report to work that night because he would be in too rough a shape from being intoxicated. The next day Porter checked himself into the Houston County Detoxification Ward and stayed there for a total of twenty eight days. Porter returned to work on June 12, 1984, at which time he was told that if he did not correct his work attendance problem his employment with Buckeye would be terminated. On July 3, 1986, Buckeye fired Porter because of his frequent absences

and for failing to return to work after recovering from injuries Porter suffered in a non-work related accident that occurred in December of 1985.

Porter asserts that because of defendant's discriminatory Pay and Progression System he was unable to transfer to the maintenance area and also failed to get a career plan that had any real value to it; thereby causing him to be unfairly compensated. The court finds that decisions made by Buckeye concerning Porter's career plan and salary were not based on discrimination, but rather legitimate business considerations predicated on Porter's unfavorable work record. Porter suffered no injury as a result of Buckeye's discriminatory Pay and Progression System.

ISSIAH ROSS, JR.

Issiah Ross, Jr. was hired by Buckeye on June 9, 1980. Ross, who did not express a preference to work in any particular area, was made a waste and water treatment technician and assigned to work in the woodyard unit. Ross was placed on B team along with Harold Hankerson and Willard Parker. As a waste and water

treatment technician, Ross basically did the same job as Willard Parker, Lynn Barry, and Jerry Barry.

Ross' original career plan called for a basic in water treatment and a basic in waste treatment. His pay curve was set at curve two where it remained until he was fired by Buckeye. Ross' next career plan had waste treatment-proficient, water treatment-proficient, and chip unloading-basic placed in it.

Ross stayed in waste and water treatment during his entire career at Buckeye. In fact, none of the black technicians in waste and water were ever transferred to another technical area while Ross worked at Buckeye. In Ross' case he never did apply for a transfer, although he asserts he would have had he known that E & I technicians and mechanical maintenance technicians were on a higher pay curve than waste and water treatment technicians.

On June 7, 1984, Ross took a qualification examination in waste and water which resulted in his being rated 100% proficient in water and 50% proficient in waste. Ross had another

qualification in waste on December 7, 1984, and was told he received a rating of 75% proficient. A sheet indicating the results of that December 7, 1984, qualification examination shows that a 75% was originally written down as the result of his qualification and then scratched over and replaced with the notation of not proficient. (Def. ex. 2 at 63).

Ross was put on an improvement plan prior to his 1984 qualification board. He was asked to write up the improvement plan but did not do so. One was written up for him by Lisa Routh. Ross' improvement plan primarily listed projects that Ross should concentrate on completing. Ross was the only one in his area put on an improvement plan. After the plan was drafted and reviewed with Ross, he was asked and agreed to present documentation which would demonstrate his improvement according to the plan. Ross did not produce any written documents to show that he was making progress towards completing his improvement plan.

Ross became disenchanted and frustrated with the Pay and Progression System because of what he perceived to be its discriminatory effect. His

relationship with his fellow employees and managers began to suffer as a result. Ross did express some of his concerns to Buckeye management personnel. On February 20, 1984, Ross met with Hooper and asked why black maintenance technicians were not allowed to cross train in the process area.

In 1984 Ross had numerous notes placed in his file indicating that his managers were not totally pleased with his dedication to his job and questioned whether Ross was performing up to the fullest extent of his ability. On July 2, 1984, Ross was informed by Buckeye management that they considered his contribution level unacceptable. He was told that if he did not achieve proficiency in both waste and water treatment and improve his overall performance and application of skills, he would not remain employed by Buckeye. Ross took a qualification in April of 1985 and was told that he did not get a 100% proficiency. Shortly thereafter, Ross was fired from his job at Buckeye.

During the early years of Ross' employment at Buckeye, when Ross and other technicians received their career plan,

cross training assignments, and were placed on their respective pay curve levels, Ross was considered a valuable employee whose skills were comparable to Lynn Barry, Jerry Barry, and other white Buckeye waste and water treatment technicians who wound up with initial placements on a curve three pay level or higher. There is testimony indicating that Ross was able to carry on day-to-day operation of the waste and water treatment area with acceptable results. In running the day-to-day operations, Ross performed the same job that other pay curve three white waste and water technicians were doing, although he was only being paid on a curve two pay level. A telling indication of Ross' qualifications and ability to perform his job as well as the curve three waste and water treatment technicians was the fact that his manager chose him, and not one of the curve three technicians, to train technicians who were cross training in water treatment. Ross carried out the task of training these technicians, despite the fact that he was not rated as proficient in water treatment at the time.

In an effort to establish that it had a legitimate business reason for

placing Ross on pay curve two, Defendant presented evidence which indicated that there were times when Ross had problems performing his job. The court finds, however, that almost all of that evidence was after-the-fact justification which could not have affected defendant's decision to place Ross on a curve two pay level. Furthermore, in balancing the evidence, the court finds that in his early years with Buckeye, Ross did not encounter any greater performance problems than the other white technicians who were paid on curve three.

Buckeye's Pay and Progression System caused almost every white technician who started out in waste and water treatment to be initially placed on curve three and almost every black waste and water technician to be placed on curve two. That same system injured Ross by causing him to be placed on curve two instead of curve three, where, based on his qualifications, he deserved to be. Buckeye has failed to convince the court that it had a legitimate business reason for placing Ross on curve two when similarly situated and equally talented white waste and water treatment technicians were placed on curve three.

EDDIE SLAUGHTER

Eddie Slaughter was hired by Buckeye on September 28, 1981. Slaughter was assigned to work in the woodyard unit in the chip unloading area. Slaughter's June, 1984 career plan summary shows that he had a career plan that called for chip unloading at a proficient qualification level. That same career plan summary listed a total new career plan that included chip unloading-proficient, waste fuel-proficient, and longwood-proficient.

In 1983 Slaughter had a proficiency rating of 100% basic in chip unloading and 100% basic in waste fuel. In 1984 his proficiency rating was 100% proficient in waste fuel and 100% proficient in chip unloading.

Slaughter was initially placed on a curve two pay plan and was still on curve two when his June 1984 career plan was prepared.

Slaughter asserts that he was injured by Buckeye's Pay and Progression System because its use resulted in him being paid less money for doing the same

work as equally qualified white Buckeye technicians. Despite his charges, however, Slaughter failed to appear at the trial and present any testimony to substantiate his claim. Nevertheless, Slaughter's attorney attempted to prove his case, but he was unable to demonstrate that Slaughter was personally discriminated against. In Slaughter's case, the court was left with insufficient evidence to reach the conclusion that Slaughter suffered any injuries because of Buckeye's discriminatory Pay and Progression System.

II. CONCLUSIONS OF LAW

Plaintiffs in the above styled case contend that defendant had a facially neutral employment practice which had a disparate impact on plaintiffs in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. In Buckeye I, the court set out to determine the validity of the plaintiffs' claim through application of the Wards Cove test. n1 The court initially found that defendant's Pay and Progression System, which utilized career plans, skill points, rankings, qualification review boards, and pay curves, was an integral part of the plant's function and was a

definite policy/practice of the company.

Next, after an exhaustive study of the relevant statistical evidence, the court found that plaintiffs had established the existence of racial disparity in regard to the salaries paid to similarly situated n2 black and white technicians at Buckeye. The court then ruled that the Pay and Progression System was the primary, if not sole, method of determining a technicians salary and that a causal connection existed between the exhibited racial disparity and the Pay and Progression System. Having found that plaintiffs met their burden of establishing a prima facie case under the disparate impact theory of recovery, the defendant inherited the burden of producing evidence which showed that the Pay and Progression System furthered legitimate employment goals. n3

Defendant met its burden of production and the court found that the Pay and Progression System had a legitimate business goal. However, the court went on to rule that an alternative employment practice that did not have an undesirable racial effect similar to that which the Pay and Progression System had

was available to Buckeye. The court's ruling established that the goals involved in the Pay and Progression System represented a legitimate business justification for the Pay and Progression System; but the actual mechanics of defendant's Pay and Progression System, implemented in an attempt to reach those goals, did not pass the second stage of the business justification test because an alternative practice was available to achieve those goals with less racial impact. Thus evolved Buckeye I's holding that defendant's Pay and Progression System, now abandoned, was a discriminatory practice which had a disparate impact on black technicians employed at Buckeye. Having made the above conclusions of law in Buckeye I, the purpose of this opinion is to now examine the claim of each plaintiff and determine if he or she was individually injured by defendant's Pay and Progression System.

Under the disparate impact theory of recovery, the plaintiff must prove individual harm. See Stephen v. PGA Sheraton Resort, Ltd., 873 F.2d 276, 279 (11th Cir. 1989). In order to demonstrate individual harm, the individual plaintiff must show that application of the specific

discriminatory practice has caused him or her to suffer a significant adverse effect. Hill v. Seaboard Coast Line R. Co., 885 F.2d 804, 811 (11th Cir. 1989). Defendant can rebut a plaintiff's claim of individual injury by demonstrating that the adverse effect he or she complains of was dictated by a legitimate non-discriminatory reason. Stephens, 873 F.2d at 279. Lack of ability or inferior qualifications are considered by this court to be legitimate non-discriminatory reasons upon which an employer can base its employment decisions. See Stephen, 873 F.2d at 280. The court will not, however, rely on "after-the-fact justification" nor "general non-time specific testimony concerning employees' inefficiency. . . ." Crawford v. Western Elec. Co. Inc., 745 F.2d 1373 (11th Cir. 1984).

In the case at bar, the parties dispute the basis upon which the court can determine whether or not an individual plaintiff had the requisite ability or qualifications. Defendant asserts that in a situation in which an employee is claiming disparate impact, the employee is required to show that he met all of the employer's criteria, both objective and subjective, to establish that he was

qualified. Plaintiffs argue that the court should only consider objective criteria. The court concludes that it may consider both objective and subjective criteria in the case sub judice. "It [is] within the district court's role and capabilities to assess whether the subjective employment qualification was bona fide and whether an employer's testimony that the plaintiff did not possess the qualification was credible." Seaboard Coast Line R. Co., 885 F.2d at 809.

The court will proceed very carefully in evaluating the subjective standards and qualifications used by defendant in implementing its Pay and Progression System. The court is mindful of the fact that in reaching its finding in Buckeye I that the Pay and Progression System was a discriminatory employment practice, the court concluded that defendant's lower level management had practically autonomous subjective authority given to them to carry out the System and that the ranking system was almost totally a subjective program with few, if any, standards to guide the managers. Furthermore, the qualification examinations and career plans developed under the Pay and Progression System were

primarily the result of lower level management exercising its subjective decision making authority. In instances where defendant's assessments, standards, and qualifications concerning individual plaintiffs are wholly subjective, the court will not consider such evidence. n4 To allow defendant to use such evidence it created under a system found to be discriminatory, when the very effect of the discriminatory system complained of was the failure of the defendant to accurately assess and establish the qualifications of the individual plaintiffs, would be grossly unfair to the plaintiffs in this case.

Having previously found in Buckeye I that the defendant's Pay and Progression System, with its many component parts, was a discriminatory employment practice that had a disparate impact on black employees at the Buckeye plant, the court now turns its attention to determining whether the individual plaintiffs in the instant case have carried their burden of establishing that they individually suffered injury as a result of defendant's discriminatory Pay and Progression System. Based on the above findings of fact, and the findings of fact and conclusions of law made in Buckeye I,

the court rules that plaintiffs Taylor, Herring, Palms, Homer, Plant, and Ross have demonstrated that they suffered individual injury as a result of defendant's discriminatory Pay and Progression System. Accordingly, the court holds that the defendant is liable to plaintiffs Taylor, Herring, Palms, Homer, Plant, and Ross for damages incurred by these plaintiffs as a result of their injuries. Plaintiffs Scott, White, Putman, Porter and Slaughter did not prove that they suffered individual injury as a result of defendant's discriminatory Pay and Progression System and thereby failed to establish liability on the part of defendant towards them. As expressed in Buckeye I, the court seeks only to settle the liability issue at this stage and will address remedies at a later date.

SO ORDERED, this 2 day of April, 1990

OPINION FOOTNOTES

n1 In a suit brought under the disparate impact theory the plaintiff must first establish a prima facie case by: (1) articulating a specific employment practice; (2) showing a racial disparity;

and (3) demonstrating a causal connection between the specified employment practice and the racial disparity. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989).

n2 In Buckeye I, the court found that the function, operation, and manner in which Buckeye set up the technicians system resulted in the technicians being similarly situated.

n3 Upon a prima facie showing of discrimination based on a disparate impact theory of recovery, the case moves into the secondary evidentiary stage known as the Business Justification Stage. Wards Cove, 109 S. Ct. at 2125. The eventual question in this examination concerns the extent that the challenged practice furthers the employers legitimate employment goals. Id. This stage contains two alternative aspects: (1) the proffered business justification; and (2) available alternative practices. Id. If a plaintiff can persuade the court on either of these aspects of this stage of the case, then he or she can recover.

n4 See Crawford v. Western Elec. Co. Inc., 745 F.2d 1373, 1385 (11th Cir.

1984), where the court held that "an employer may not utilize wholly subjective standards to judge its employees' qualifications and then plead lack of qualifications when its promotion process is challenged as discriminatory."

APPENDIX D (BUCKEYE III)

ISSIAH ROSS, JR., WILLIAM MORGAN PORTER, JOHNNIE LEE PALMS, JAMES C. HOMER, JOHN W. TAYLOR, VERNON ALEXANDER PUTMAN, HOSEY J. WHITE, JR., FRANKLIN ROOSEVELT SCOTT, GERRY PLANT, TABITHA HERRING, EDDIE SLAUGHTER, Plaintiffs,

vs.

BUCKEYE CELLULOSE CORP., Defendant

CIV. No. 86-048-ALB/AMER (DF)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ALBANY/AMERICUS DIVISION

764 F. Supp. 1543

June 4, 1991, Decided

COUNSEL

James Finkelstein, Albany, Georgia, for Plaintiffs.

John G. Skinner, Robert N. Godfrey, SMITH, CURRIE & HANCOCK, Atlanta, Georgia, for Defendant.

JUDGES

Duross Fitzpatrick, United States District Judge.

AUTHOR: FITZPATRICK

OPINION

DUROSS FITZPATRICK, UNITED STATES DISTRICT JUDGE

In an order issued by the court in the above styled case on August 11, 1989, 733 F. Supp. 344 (hereinafter referred to as Buckeye I), the court determined that defendant's Pay and Progression System was a discriminatory employment practice that had a ongoing disparate impact on blacks employed at Buckeye Cellulose Corporation (Buckeye). On April 2, 1990, 733 F. Supp. 363, the court concluded the second phase of this case, (hereinafter referred to as Buckeye II), by rendering its individual findings of facts and conclusions of law concerning defendant's liability to the individual plaintiffs arising from their disparate impact claim. The court will now complete the final phase of this action by determining herein the damage award each prevailing plaintiff in this case is

entitled to receive and by ruling on plaintiffs' request for attorney's fees. Defendant would also have the court revisit the issue of whether or not plaintiffs' filed their charges against the defendant in a timely manner. The court, however, will not reexamine that issue and instead stands by its earlier ruling rendered in Buckeye I.

I. DAMAGES

In awarding damages to the prevailing plaintiffs (hereinafter plaintiffs), the court must attempt to place each one in the position he or she would have been in absent defendant's discriminatory practices. Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). The means of accomplishing that goal in this case is to award back pay and other equitable relief, which the plaintiffs in this case are entitled to receive based on the court's finding that they are victims of defendant's discriminatory Pay and Progression System. Id. at 418-19, 95 S. Ct. at 2372. Interest, overtime, shift differentials, and fringe benefits such as vacation pay, sick pay and profit sharing are all components of back pay that are to

be included in the computation of such an award, if applicable. See Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1562 (11th Cir. 1986). The back pay awarded should equal the amount the party would have received had there been no discrimination less the pay he or she actually collected as a result of the defendant's discriminatory actions. Moody, 422 U.S. at 418-19, 95 S. Ct. at 2372.

An award of back pay damages also entitled the recipient to receive prejudgment interest on the damage award computed in accordance with the prevailing IRS prime rates. See EEOC v. Guardian Pools, Inc., 828 F.2d 1507, 1512 (11th Cir. 1987); Smith v. American Service Co. of Atlanta, Inc., 796 F.2d 1430, 1432 (11th Cir. 1986). All plaintiffs receiving back pay damages in this action will therefore be granted prejudgment interest on the amount of back pay awarded each year as computed by the clerk of court based on the prevailing IRS prime rates. Further equitable relief appropriate in this case is the placement of plaintiffs currently employed at Buckeye on the same pay scale they would have been on but for the discriminatory practices of Buckeye. See International Brotherhood of Teamsters

v. United States, 431 U.S. 324, 364, 97 S. Ct. 1843, 1869, 52 L. Ed. 2d 396 (1977).

Determining the amount of back pay that should be awarded to the plaintiffs in this case will require the court to "recreate the employment history of the individual victims and hypothesize the time and place of each employee's advancement absent the unlawful practice." Myers v. Gilman Paper Co., 527 F. Supp. 647, 649-50 (S.D. Ga. 1981)(citing International Brotherhood of Teamsters, 431 U.S. at 372, 97 S. Ct. at 1873). In doing so, "unrealistic exactitude is not required, [and] uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer." Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-61 (5th Cir. 1974). The court will engage in an imprecise process that will necessarily require a certain amount of estimation. International Brotherhood of Teamsters, 431 U.S. at 372, 97 S. Ct. at 1873. A process made even more difficult by the fact that the very nature of defendant's discriminatory practice was the systematic, ongoing failure of Buckeye to fairly appraise, examine, qualify, and

reward the plaintiffs. The calculation of back pay damages in this case, however, is by no means an impossible task that will force the court to engage in mere speculation.

The court heard months of testimony in this case which has allowed it to piece together an accurate picture of the competence, intelligence, and skill of each of the plaintiffs in comparison with their fellow workers and to determine how those attributes would have resulted in their advancement in a work place such as Buckeye's absent discriminatory practices. Mindful of those findings and aided by thousands of pages of records, transcripts, and exhibits, the court will determine the damages each plaintiff is entitled to receive based on its finding that they were injured by Buckeye's discriminatory Pay and Progression System.

In computing back pay damages in this case, the court first determined each plaintiff's actual average annual hourly rate and the actual hours that plaintiff worked each year. The court then determined the average annual hourly pay rate of a similarly situated white technician. Using that data, the court

projected the annual salary plaintiff would have earned absent defendant's discriminatory practices by multiplying the average annual hourly pay rate of the similarly situated white technician times the actual hours the plaintiff worked each year. The resulting figure, minus the plaintiff's actual annual salary, equals the amount of back pay damages awarded.

The period of the comparisons used to determine the extent of each plaintiff's injury began on the date two years prior to the filing of the particular plaintiff's EEOC complaint and ended when either he or she began receiving the same compensation as the person he or she is being compared with or when the particular plaintiff resigned or was terminated; whichever came first. In the case of plaintiffs Taylor and Palms, the period began on the date two years prior to the filing of their EEOC complains and continued to the present since both are still employed by Buckeye but have never reached the top wage rate comparable white technicians were paid.

Once the additional back pay amount was established, the court had the defendant determine the additional

benefits each plaintiff would have been entitled to receive as a result of the increased salary each would have earned under the courts calculations.

JOHN TAYLOR

The court's findings of fact demonstrate that plaintiff John Taylor had numerous talents that Buckeye took advantage of which made him one of their most valued employees. The skills Taylor possessed and the manner in which he carried out his job earned similarly situated white employees at Buckeye the highest ratings and largest salaries paid by Buckeye. This employee, who Buckeye thought enough of to make a shift team coordinator, would have advanced rapidly at the company if not for its discriminatory Pay and Progression System. The court therefore finds that in order to place Taylor in the position he would have been in absent defendant's discriminatory practices, his compensation should be computed in accordance with what the highest paid technicians at Buckeye were paid.

One of the higher paid white technicians who Taylor compares most

favorably to is Walter "Sonny" Ard. Consequently, the most reliable means of determining the damages Taylor is entitled to receive is to compare his wage rate to that of Walter Ard and award him such damages as would result in him earning the same compensation Buckeye paid Walter Ard when Ard was considered one of their top technicians. Such a comparison reveals that Taylor is entitled to a back pay damages award of $ 57,963.00 n1 plus prejudgment interest and profit sharing benefits totaling 126.498 shares of Buckeye common stock, 3.572 shares of preferred stock, and $ 150.23 in cash. See Defendant's Supplemental Memorandum Regarding Damages, exh. C and exh. A-1. Those compensation computations which have been verified and are hereby adopted by the court, as is the case with all the compensation figures used in this order, were computed by the defendant in strict accordance with the court's instructions for compiling damages detailed earlier in this opinion. See appendix for a complete breakdown of all the compensation computations. In order to place Taylor in the position he would have been in absent defendant's discriminatory practices, Buckeye is also ORDERED to immediately begin paying Taylor at a wage rate

comparable to a curve 5 pay rate and to maintain him on that wage rate as long as he satisfactorily performs his job.

TABITHA HERRING

A recreation of plaintiff Tabitha Herring's employment history indicates that she would not have advanced as quickly or as far as plaintiff Taylor but, nevertheless, would have received greater compensation than she actually obtained if not for Buckeye's unlawful practices. The court noted in its findings of fact that Herring was unjustly injured when she had mechanical maintenance removed from her career plan and was continually denied the opportunity for meaningful advancement as a result of Buckeye's discriminatory Pay and Progression System. In attempting to discern how and when plaintiff Herring would have advanced absent the discrimination at Buckeye, the court finds that the careers of similarly situated white technicians Jerry Barry and Lynn West Barry provide a good example of how Herring's career would have progressed had she not been discriminated against. Those technicians, like Herring, were not considered, nor compensated as, top of the line employees. They were, however,

competent employees who could be relied upon to perform their jobs in a satisfactory manner. A comparison of the compensation Jerry Barry received and that of plaintiff Herring indicates that in order to make her whole again she is entitled to a damage award of $ 17,510.00 n2 in back pay plus prejudgment interest and profit sharing benefits totaling 47.146 shares of Buckeye common stock and $ 24.15 in cash. See Defendant's Supplemental Memorandum Regarding Damages, exh. A and exh. A-1.

JOHNNIE LEE PALMS

The skills and training plaintiff Johnnie Lee Palms brought to Buckeye made him a top candidate for rapid advancement within the company. It is clear from the court's findings that Buckeye recognized the accomplishments and talent of Palms by making him a shift team coordinator; one of its top positions for technicians. Palms performed tasks on the same skill level as Buckeye's higher rated white technicians. As a result of the discriminatory Pay and Progression System, however, Palms was not compensated or promoted similar to white technicians who were deemed superior technicians. Absent

the discriminatory practices of Buckeye, Palms would have not only been utilized as one of Buckeye's top technicians; he also would have been compensated like one.

Above average white technicians at Buckeye who had similar skills and training as Palms, such as Joseph Willard Parker, provide the appropriate model for determining the extent of Palms damages. Comparing Palms compensation with that of Parker indicates that in order to place Palms in the position he would have been in had he not been discriminated against, Palms is entitled to receive a back pay award of $ 31,982.00 n3 plus prejudgment interest and profit sharing benefits totaling 66.396 shares of Buckeye common stock, 1.388 shares of preferred stock, and $ 68.85 in cash. See Defendant's Supplemental Memorandum Regarding Damages, exh. D revised and exh. A-1. In order to place Palms in the position he would have been in absent defendant's discriminatory practices, Buckeye is also ORDERED to immediately begin paying Palms at a wage rate comparable to a curve 4 pay rate and to maintain him on that wage rate as long as he satisfactorily performs his job.

JAMES C. HOMER

Plaintiff James Homer was a hard working mechanical maintenance technician who eagerly sought to gain training skills in any area Buckeye would allow in order to enhance his value to the company. Because of Buckeye's discriminatory Pay and Progression System, however, Homer was consistently denied the opportunity to have cross skills added to his career plan and thereby increase his salary. He worked beside comparably skilled white technicians who were paid a higher salary than he was despite the fact that they all had the same job classification. Homer had the qualifications to have additional skills added to his career plan and to be compensated at rate equal to similarly situated white technicians such as William "Freddy" Hogg, Jr., and David "Tim" Phelps; and would have been so compensated absent Buckeye's discriminatory practices. Therefore, in order to make Homer whole again, he must be awarded compensation equal to that of Phelps' and Hogg's which amounts to damages of $ 13,759.00 n4 in back pay plus prejudgment interest and profit sharing benefits totaling 37.149 shares of Buckeye common stock and $ 19.09 in cash. See Defendant's Supplemental Memorandum Regarding Damages, exh. B and

exh. A-1.

GERRY PLANT

Plaintiff Gerry Plant exhibited a conscientious desire to excel in all phases of his job with Buckeye. Plant gained a reputation as being one of Buckeye's best technicians with unparalleled mechanical skills on some of the companies specialized equipment. Throughout his career at Buckeye he was a highly competent hard working technician who had the ability and qualifications to be a top technician. The evidence in the case indicates that absent Buckeye's discriminatory practices he would have been compensated as such.

Allen Massey, Ray Harth, and Roy Peterson are white technicians at Buckeye who had similar skills as Plant and demonstrate the promotions and compensation Plant would have received at Buckeye had he not been the victim of Buckeye's discriminatory practices. Comparing Ray Peterson's compensation to the compensation Plant earned indicates that Plant's damages as a result of Buckeye's discriminatory Pay and Progression System are $ 23,760.00 n5 in

back pay (which represents $ 33,760.00 computed as back pay owing minus the $ 10,000.00 damage award he received under his Section 1981 claim) plus prejudgment interest and profit sharing benefits totaling 85.100 shares of Buckeye common stock, 0.769 shares of preferred stock, and $ 63.37 in cash less a $ 1,000.00 deduction which must be made from Plant's profit sharing benefits since Plant received a previous jury award of $ 1,000.00 as compensation for lost benefits. See Defendant's Supplemental Memorandum Regarding Damages, exh. E and exh. A-1.

ISSIAH ROSS, JR.

Plaintiff Issiah Ross, Jr., was a solid employee who was able to carry on the day-to-day operation of the areas he was assigned to work in an acceptable manner. In performing his job, however, he was paid less than other similarly situated white technicians who were performing the same tasks with relatively the same results. An indication of Ross' qualifications and ability to perform his job as well as his higher paid counterparts is demonstrated by the fact that Buckeye chose him, and not his higher

paid and rated fellow employees, to train technicians who were cross training in the area in which Ross worked. The court's findings demonstrate that Ross was initially placed on a lower pay scale than he deserved to be on and was kept there as a direct result of Buckeye's discriminatory Pay and Progression System. Had there been no discrimination at Buckeye, Ross undoubtedly would have received compensation commensurate with that received by Jerry Barry; a white technician at Buckeye of equal standing with Ross. A comparison between the compensation of Jerry Barry and Ross indicates that Ross suffered damages because of Buckeye's discriminatory practices in the amount of $ 21,971.00 n6 in back pay plus prejudgment interest and profit sharing benefits totaling 54.410 shares of Buckeye common stock and $ 27.88 in cash. See Defendant's Supplemental Memorandum Regarding Damages, exh. F and exh. A-1.

II. ATTORNEY'S FEES

The final matter pending before the court in this case is the plaintiffs' motion for attorney's fees. The established procedure for resolving such

an issue is for the court to determine the number of hours plaintiffs' attorney reasonably expended on the litigation and multiply that figure by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983). The resulting yield is commonly known as the "lodestar," which the court may then adjust up or down in its discretion depending on various considerations involved in the case.

The court's first step in determining the proper attorney's fees in this case will be to ascertain the appropriate reasonable hourly rate. "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman v. Housing Authority of Montgomery, 836 F.2d 1292 (11th Cir. 1988)(citing Blum v. Stenson, 465 U.S. 886, 895-96 n. 11, 104 S. Ct. 1541, 1547 n. 11, 79 L. Ed. 2d 891 (1984)). The relevant legal community in this case is the area in which this court sits and the service provided was the litigation of a complex employment discrimination suit by an experienced attorney who demonstrated a considerable

amount of skill in organizing and advocating plaintiffs' case. A review of the evidence the parties have submitted regarding a reasonable hourly rate in such an area for such services indicates that the prevailing rate a reasonably comparable attorney would receive is $ 135.00 per hour. Plaintiffs' attorney in the instant case, therefore, is entitled to compensation at the rate of $ 135.00 per hour.

The next step in deciding the appropriate attorney's fees award is to ascertain the number of hours reasonably expended by plaintiffs' attorney. In determining that figure, "'excessive, redundant or otherwise unnecessary' hours should be excluded from the amount claimed." Norman, 836 F.2d at 1301 (citing Hensley, 461 U.S. at 434, 103 S. Ct. at 1939-40). A careful review of the 2242.50 hours submitted by plaintiffs' attorney does not reveal the presence of any excessive, redundant or otherwise unnecessary hours which should be excluded from the amount he has claimed. Plaintiffs' attorney has used good "billing judgment" by submitting only hours which it would not be unreasonable to expect him to present to one of his

paying client.

Having determined the reasonable hourly rate ($ 135.00 per hour) and the hours reasonably expended (2242.50), the court is able to calculate that the lodestar amount in this case is $ 302,737.50 (2242.50 hours @ $ 135.00 per hour). Establishing the appropriate amount of attorney's fees to be awarded does not, however, end with the computation of the lodestar. The next step the court must undertake is to make any necessary adjustments to the lodestar based upon the results obtained by plaintiffs' attorney. Norman, 836 F.2d at 1302. The court's assessment of the results obtained in a case such as this, where the theories of the consolidated cases derive from a common core of operative facts, should focus on the overall outcome. Id. If that outcome, however significant, is "limited in comparison to the scope of the litigation as a whole," then it is proper for the court to reduce the lodestar figure. Id. "In doing so, the court may attempt to identify specific hours spent in unsuccessful claims or it may simply reduce the award by some proportion." Id.

Plaintiffs' attorney in the instant

case realized significant results. The results were, however, limited when one notes that the litigation as a whole involved separate claims for relief by thirteen individual plaintiff of which six ultimately received a damages award. The court, therefore, finds it necessary to proportionately reduce the lodestar amount of $ 302,737.50 by twenty-five percent (25%) thereby arriving at an attorney's fees award of $ 227,053.12.

The court's reduction is not based on a simple ratio of successful plaintiffs to the total number of plaintiffs involved nor prevailing issues opposed to issues presented. See Hensley, 461 U.S. at 435 n. 11, 103 S. Ct. 1940, 76 L. Ed. 2d 40 n. 11. Rather, the court took into account the fact that some of the plaintiffs' attorney's efforts were dedicated solely to advancing the cause of unsuccessful plaintiffs although a vast majority of his time was used to analyze, organize, and present evidence that was germane to all the cases. See id. at 435, 461 U.S. at 435, 103 S. Ct. at 1940.

Another issue the court must address is whether the attorney's fees award should be enhanced. An enhancement

is in order "if the results obtained were exceptional." Norman, 836 F.2d at 1302. A review of the outcome of this case based on that criteria indicates that an enhancement of the attorney's fees award is unwarranted. Plaintiffs' attorney obtained important results that will undoubtedly guide future actions and decisions of Buckeye. The outcome cannot be classified as exceptional, however, since it was not an unexpected result in light of the prevailing law which clearly outlaws the type of discrimination defendant imposed upon the plaintiffs. See Id.

Enhancement of an attorney's fees award may also be appropriate when the attorney's fee was set up on a contingency basis, as was the situation in this case. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 730, 107 S. Ct. 3078, 3089, 97 L. Ed. 2d 585 (1987) (Delaware Valley Citizens' Council II). That type of enhancement is to be awarded, however, only when it is demonstrated that it is necessary as the only means of insuring the availability of attorneys. Id. at 731, 107 S. Ct. at 3089 (O'Connor, J., concurring); Perkins v. Mobile Housing Board, 847 F.2d 735, 738-39

(11th Cir. 1988). There has not been an adequate showing that attorneys were not, and are not, available in this court's district to take on the type of case now before the court. The court, therefore, declines to enhance the attorney's fees awarded in this case based on the existence of a contingency fee arrangement.

The final basis considered by the court upon which enhancement may be warranted is if there is a delay in the prevailing counsel's receipt of payment. Norman, 836 F.2d at 1302. If the court determines that there is a delay, it may "award compensation at current rates rather than at historic rates." Id. Plaintiffs' attorney began work on this case in 1985 and has yet to receive final compensation which leads this court to conclude that there has been a delay in his receipt of payment. The court, therefore, finds that the hourly rate applicable in this case should be computed in accordance with current rates and the court has done just that in arriving at the reasonable hourly rate of $ 135.00 afforded the plaintiffs' attorney.

As part of his attorneys' fees,

plaintiffs' attorney has also requested reimbursement for mileage expenses totaling $ 2,009.41. Reasonable expenses are considered a component of reasonable attorney' fees in this circuit. Dowdell v. Apopka, 698 F.2d 1181 (11th Cir. 1983). The court therefore GRANTS the request for mileage expenses totaling $ 2,009.41 since it considers the amount to be a reasonable expense; especially since this was an Albany Division case tried in the Macon Division.

Along with their request for attorney's fees, plaintiffs have also asked the court to award expert witness' fees and support staff costs. The expert witness' fees requested by the plaintiffs totals $ 85,992.50 for services rendered by Mr. Jimmy Ramsey. Recent case law indicates, however, that the court cannot award plaintiffs the expert witness' fees that they have requested.

In the case of International Woodworkers of America v. Champion International Corp., 790 F.2d 1174 (5th Cir. 1986), the Fifth Circuit Court of Appeal thoroughly analyzed the issue of whether the prevailing party in a Title VII and 42 U.S.C. 1981 employment

discrimination suit was entitled to expert witness' fees. In resolving that issue, the court first noted that American courts have traditionally been denied the right to tax expert witness' fees beyond those specifically authorized by statute. It was only through creative interpretation of Senate reports read to indicate Congressional intent to apply different rules in civil rights cases that courts were able to award any expert witness' fees beyond those provided for in 28 U.S.C. 1821. n7 See Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981)(en banc), cert. dismissed, 453 U.S. 950, 69 L. Ed. 2d 1033, 102 S. Ct. 27 (1981), overruled by International Woodworkers of America, 790 F.2d at 1180. In overruling all previous decision it rendered based on such an interpretation, the court in International Woodworkers went on to note that a true reading of those reports fails to establish any judicial authority to award a prevailing party expert witness' fees. It concluded that:

Given Congress' ability to provide explicitly for the taxing of excess expert witness' fees as costs, we should not infer congressional intent to award such costs in the absence of an express statute

so providing. Moreover, a statute which provides only for an award of "costs" or "attorneys' fees" but which fails to address expert witness' fees will not be construed to authorize the taxing of expert witness' fees in excess of the 1821 amount.

International Woodworkers, 790 F.2d at 1179-80. Based on that conclusion and its finding that 42 U.S.C. 1988 and 2000e-5(k) make no provisions for an award of excess expert witness' fees, the court held that the prevailing plaintiff was not entitled to receive any expert witness' fees other than those specified in 28 U.S.C. 1821. Id. at 1181.

The plaintiff in International Woodworkers appealed the decision of the Fifth Circuit and his petition for certiorari was granted by the Supreme Court of the United States. International Woodworkers of America, 790 F.2d 1174, cert. granted sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987). The Supreme Court reviewed the analysis employed by the Fifth Circuit in reaching it decision and stated "we agree and hold that when a prevailing party seeks

reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of 1821(b), absent contract or explicit statutory authority to the contrary." Crawford Fitting Co., 482 U.S. at 439, 107 S. Ct. at 2496. Accordingly, this court holds that plaintiffs in the instant case are not entitled to receive any expert witness' fees other than those specified in 28 U.S.C. 1821. Those expenses plaintiffs' are entitled to receive as expert witness' fees under 1821(b) will be taxed as costs which plaintiffs can recover by submitting a bill of costs to the clerk of court.

In line with the reasoning adopted in Crawford Fitting Co., the court is also precluded from reimbursing plaintiffs for the cost of services provided by Terri C. Long. There is no indication from the evidence that Ms. Long, a former manager at MacGregor Golf Co., performed any legal work which can be properly billed under the heading of reasonable attorney's fees. See Amendment To Motion For Attorney Fees And Costs For Plaintiffs Gerry Plant And Issiah Ross, exh. K. Ms. Long's expenses are more properly considered overhead which is covered under the hourly rate plaintiffs' attorney charges. Therefore,

in accordance with the applicable law, plaintiffs' request for $ 1,875.00 as reimbursement for the services of Terri C. Long is DENIED.

Plaintiffs' request for payment for the services provided by two law students, Ray Brooks and Thomas Bond, and Cathy Hires, a paralegal, constitute a component of reasonable attorney's fees which a prevailing plaintiff is entitled to receive. Missouri v. Jenkins, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989); Riverside v. Rivera, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986). A review of the hours submitted by each of those legal support staff individuals reveals reasonable hourly rates in line with the prevailing market rate in this area for comparable services. Law student Ray Brooks logged 292.75 hours at a rate of $ 25.00 per hour. Affidavit of Raymond Thomas Brooks In Support Plaintiffs' Motion For Attorney's Fees. Law student Thomas Bond logged 35 hours at a rate of $ 25.00 per hour. Amendment To Motion For Attorney Fees And Costs For Plaintiffs Gerry Plant And Issiah Ross, exh. M. Paralegal Cathy Hires logged 75 hours at a rate of $ 50.00 per hour. Id., exh. L. The hours presented also all represent hours

reasonably expended without the inclusion of any excessive, redundant or otherwise unnecessary hours in the amount claimed. The lodestar computations for the legal support staff, therefore, yields the amounts of: $ 7,318.75 (292.75 hours @ $ 25.00 per hour) for the services of law student Ray Brooks; $ 875.00 (35 hours @ $ 25.00 per hour) for the services of law student Thomas Bond; and $ 3,750.00 (75 hours @ $ 50.00 per hour) for the services of paralegal Cathy Hires.

The legal support staff's hours are also subject to the same twenty-five percent (25%) lodestar reduction applied to plaintiffs' attorney's hours since the legal staff similarly worked on the successful, as well as the unsuccessful, claims. Accordingly, plaintiffs are entitled to receive the following amount as compensation for legal support staff fees: $ 5,489.06 for the services of law student Ray Brooks; $ 656.25 for the services of law student Thomas Bond; and $ 2,812.50 for the services of paralegal Cathy Hires.

III. CONCLUSION

Based on the findings of fact and

conclusions of law made in Buckeye I and Buckeye II, the court hereby ORDERS that in accordance with the above stated rulings defendant pay damages to the prevailing plaintiffs totaling: $ 57,963.00 plus prejudgment interest and profit sharing benefits totaling 126.498 shares of Buckeye common stock, 3.572 shares of preferred stock, and $ 150.23 in cash to plaintiff Taylor; $ 17,510.00 in back pay plus prejudgment interest and profit sharing benefits totaling 47.146 shares of Buckeye common stock and $ 24.15 in cash to plaintiff Herring; $ 31,982.00 in back pay plus prejudgment interest and profit sharing benefits totaling 66.896 shares of Buckeye common stock, 1.388 shares of preferred stock, and $ 68.85 in cash to plaintiff Palms; $ 13,759.00 in back pay plus prejudgment interest and profit sharing benefits totaling 37.149 shares of Buckeye common stock and $ 19.09 in cash to plaintiff Homer; $ 23,760.00 in back pay plus prejudgment interest and profit sharing benefits totaling 85.100 shares of Buckeye common stock, 0.769 shares of preferred stock, and $ 63.37 in cash to plaintiff Plant (less a $ 1,000.00 deduction from Plant's profit sharing benefits); and $ 21,971.00 in back pay plus prejudgment interest and profit

sharing benefits totaling 54.410 shares of Buckeye common stock and $ 27.88 in cash to plaintiff Ross.

Defendant Buckeye is also ORDERED to pay a total of $ 175,794.10 in attorney's fees. n8

Lastly, the court RULES that all outstanding motions not addressed herein are made moot by this order and hereby DISMISSED WITHOUT PREJUDICE.

SO ORDERED, this 4 day of June, 1991.

APPENDIX

EXHIBIT A

TABITHA HERRING'S HISTORY OF WAGE RATES (actual)

ACTUAL PERSONAL ADJUSTMENTS EFFECTIVE DATE	PAY LEVEL	1980	EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES 10/6/80	6/15/81	6/7/82	6/13/83
6/9/80	Hire Rate	6.50				
9/15/80	T-103	7.00	7.20			
12/8/80	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					
3/9/81	T-209		8.50			
	T-212					
	T-218					
	T-224					
6/13/83	T-230					*11.55
6/8/81	T-312		9.05	9.85		
			*Ms. Herring went from her pay point on Curve 3 to a pay point on Curve 2 that was higher in cents/ho			
12/7/81	T-318			10.60	11.30	
	T-324					
	T-330					
6/5/89	T-336					

ACTUAL PERSONAL ADJUSTMENTS EFFECTIVE DATE	PAY LEVEL	1980	EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES 6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
6/9/80	Hire Rate	6.50					
9/15/80	T-103	7.00					
12/8/80	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
3/9/81	T-209						
	T-212						

	T-218					
	T-224					
6/13/83	T-230		12.20	12.50	12.81	
6/8/81	T-312					
12/7/81	T-318					
	T-324					
	T-330					
6/5/89	T-336				14.19	14.59	15.17

Actual Wage Rates (Tabitha Herring)

	1983	1984	1985	1986	1987
January	11.30	11.55	12.20	12.20	12.50
February	11.30	11.55	12.20	12.20	12.50
March	11.30	11.55	12.20	12.20	12.50
April	11.30	11.55	12.20	12.20	12.50
May	11.30	11.55	12.20	12.20	12.50
June	11.55	11.55	12.20	12.20	12.50
July	11.55	12.20	12.20	12.20	12.50
August	11.55	12.20	12.20	12.20	12.50
September	11.55	12.20	12.20	12.20	12.50
October	11.55	12.20	12.20	12.50	12.50
November	11.55	12.20	12.20	12.50	12.50
December	11.55	12.20	12.20	12.50	12.50
Average	11.45	11.88	12.20	12.28	12.50
W-2 Earnings	$ 29,260	$ 29,540	$ 31,436	$ 32,242	$ 26,899
Equiv. Pd. Hrs.	2555	2487	2577	2626	2152

	1988	1989	1990	1991
January	12.50	12.81	14.59	15.17
February	12.50	12.81	14.59	15.17
March	12.50	12.81	14.59	15.17
April	12.50	12.81	14.59	15.17
May	12.50	12.81	14.59	
June	12.50	14.19	14.59	
July	12.50	14.19	15.17	
August	12.81	14.59	15.17	
September	12.81	14.59	15.17	
October	12.81	14.59	15.17	
November	12.81	14.59	15.17	
December	12.81	14.59	15.17	
Average	12.63	13.78	14.88	15.17

W-2 Earnings	$8,267	$30,165	$39,821	$12,931	
Equiv. Pd. Hrs. FDH (herring3) 5/8/91	655	2189	2676	852	

TABITHA HERRING'S "WHAT IF?" WAGE RATES (had she received same wage rates as Jerry Barry)

Jerry Barry's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES

PERSONAL ADJUSTMENTS EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
6/9/80	Hire Rate	6.50				
9/15/80	T-103	7.00	7.20			
12/8/80	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					
3/9/81	T-209		8.50			
	T-212					
	T-218					
	T-224					
	T-230					
6/8/81	T-312		9.05	9.85		
12/7/81	T-318			10.60		
6/7/82	T-324			10.95	11.65	
12/6/82	T-330				12.00	
6/6/83	T-336				12.15	12.80

Jerry Barry's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES

PERSONAL ADJUSTMENTS EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
6/9/80	Hire Rate	6.50					
9/15/80	T-103	7.00					
12/8/80	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
3/9/81	T-209						

	T-212					
	T-218					
	T-224					
	T-230					
6/8/81	T-312					
12/7/81	T-318					
6/7/82	T-324					
12/6/82	T-330					
6/6/83	T-336		13.55	13.85	14.19	14.59	15.17

TABITHA HERRING'S "WHAT IF?" WAGE RATES (had she received same wage rates as Jerry Barry)

Jerry Barry's history of wage rates (Curve 3)

	1983	1984	1985	1986	1987
January	12.00	12.80	13.55	13.55	13.85
February	12.00	12.80	13.55	13.55	13.85
March	12.00	12.80	13.55	13.55	13.85
April	12.00	12.80	13.55	13.55	13.85
May	12.00	12.80	13.55	13.55	13.85
June	12.80	12.80	13.55	13.55	13.85
July	12.80	13.55	13.55	13.55	13.85
August	12.80	13.55	13.55	13.55	13.85
September	12.80	13.55	13.55	13.55	13.85
October	12.80	13.55	13.55	13.85	13.85
November	12.80	13.55	13.55	13.85	13.85
December	12.80	13.55	13.55	13.85	13.85
Barry's Average Rate	12.47	13.18	13.55	13.63	13.85
Herrings's Equiv. Pd.	2555	2487	2577	2626	2152
Herring's "What If?"	$ 31,861	$ 32,779	$ 34,918	$ 35,792	$ 29,805
Herring's Actual	$ 29,260	$ 29,540	$ 31,436	$ 32,242	$ 26,899
Difference	$ 2,601	$ 3,239	$ 3,482	$ 3,550	$ 2,906

Jerry Barry's history of wage rates (Curve 3)

	1988	1989	1990	1991
January	13.85	14.19	14.59	15.17
February	13.85	14.19	14.59	15.17
March	13.85	14.19	14.59	15.17
April	13.85	14.19	14.59	15.17
May	13.85	14.19	14.59	
June	13.85	14.19	14.59	
July	13.85	14.19	15.17	
August	14.19	14.59	15.17	
September	13.85	14.19	15.17	
October	13.85	14.19	15.17	
November	13.85	14.19	15.17	
December	13.85	14.19	15.17	
Barry's Average Rate	13.99	14.36	14.88	15.17
Herring's Equiv. Pd.	655	2189	2676	852
Herring's "What If?"	$9,163	$31,434	$ 39,821	$ 12,931
Herring's Actual	$8,267	$30,165	$ 39,821	$ 12,931
Difference	$896	$1,269	$ 0	$ 0

FDH (herring3) 5/8/91

EXHIBIT B

JAMES HOMER'S HISTORY OF WAGE RATES (actual)

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
7/7/80	Hire Rate	6.50	6.50			
10/13/80	T-103		7.20			
1/5/81	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					

4/6/81	T-209		8.50	9.25		
	T-212					
	T-218					
	T-224					
	T-230					
7/6/81	T-312			9.85		
1/4/82	T-318			10.60	11.30	
7/5/82	T-324				11.65	
1/3/83	T-330				12.00	12.60
7/5/83	T-336					12.80
	T-424					
	T-430					
	T-436					
*4/4/88	T-442		*Actual qualification and promotion date.			

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES				
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
7/7/80	Hire Rate						
10/13/80	T-103						
1/5/81	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
4/6/81	T-209						
	T-212						
	T-218						
	T-224						
	T-230						
7/6/81	T-312						
1/4/82	T-318						
7/5/82	T-324						
1/3/83	T-330						
7/5/83	T-336		13.55	13.85			
	T-424						
	T-430						
	T-436						
*4/4/88	T-442			14.90	15.27	15.70	16.33

Actual Wage Rates (James Horner)

1983	1984	1985	1986	1987

January	12.00	12.80	13.55	13.55	13.85
February	12.00	12.80	13.55	13.55	13.85
March	12.00	12.80	13.55	13.55	13.85
April	12.00	12.80	13.55	13.55	13.85
May	12.00	12.80	13.55	13.55	13.85
June	12.60	12.80	13.55	13.55	13.85
July	12.80	13.55	13.55	13.55	13.85
August	12.80	13.55	13.55	13.55	13.85
September	12.80	13.55	13.55	13.55	13.85
October	12.80	13.55	13.55	13.85	13.85
November	12.80	13.55	13.55	13.85	13.85
December	12.80	13.55	13.55	13.85	13.85
Average	12.45	13.18	13.55	13.63	13.85
Actual W-2 Earnings	$ 32,138	$35,594	$ 36,597	$ 37,679	$ 39,186
Equiv. Pd. Hrs.	2581	2701	2701	2764	2829

	1988	1989	1990	1991
January	13.85	15.27	15.70	16.33
February	13.85	15.27	15.70	16.33
March	13.85	15.27	15.70	16.33
April	14.90	15.27	15.70	16.33
May	14.90	15.27	15.70	
June	14.90	15.27	15.70	
July	14.90	15.27	16.33	
August	15.27	15.70	16.33	
September	15.27	15.70	16.33	
October	15.27	15.70	16.33	
November	15.27	15.70	16.33	
December	15.27	15.70	16.33	
Average	14.79	15.45	16.02	16.33
Actual W-2 Earnings	$35,677	$36,823	$40,609	$14,404
Equiv. Pd. Hrs.	2412	2383	2535	882

FDH (homer3) 5/8/91

JAMES HOMER'S "WHAT IF?" WAGE RATES (had he received same wage rates as William Hogg and David Phelps)

PERSONAL ADJUSTMENTS			Hogg's and Phelp's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
6/9/80	Hire Rate	6.50				
9/15/80	T-103	7.00	7.20			
12/8/80	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					
3/9/81	T-209		8.50			
	T-212					
	T-218					
	T-224					
	T-230					
6/8/81	T-312		9.05	9.85		
12/7/81	T-318			10.60		
	T-324					
	T-330					
	T-336					
6/7/82	T-424			11.40	12.15	
12/6/82	T-430				12.75	13.40
9/5/83	T-436					13.70
3/5/84	T-442					13.85

PERSONAL ADJUSTMENTS			Hogg's and Phelp's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES				
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
6/9/80	Hire Rate	6.50					
9/15/80	T-103	7.00					
12/8/80	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
3/9/81	T-209						
	T-212						
	T-218						
	T-224						
	T-230						
6/8/81	T-312						

12/7/81	T-318					
	T-324					
	T-330					
	T-336					
6/7/82	T-424					
12/6/82	T-430					
9/5/83	T-436					
3/5/84	T-442	14.60	14.90	15.27	15.70	16.33

JAMES HOMER'S "WHAT IF" WAGE RATES (had he received same wage rates as William Hogg and David Phelps)
Hogg's and Phelps' history of wage rate (Curve 4)

	1983	1984	1985	1986	1987
January	12.75	13.70	14.60	14.60	14.90
February	12.75	13.70	14.60	14.60	14.90
March	12.75	13.85	14.60	14.60	14.90
April	12.75	13.85	14.60	14.60	14.90
May	12.75	13.85	14.60	14.60	14.90
June	13.40	13.85	14.60	14.60	14.90
July	13.40	14.60	14.60	14.60	14.90
August	13.40	14.60	14.60	14.60	14.90
September	13.70	14.60	14.60	14.60	14.90
October	13.70	14.60	14.60	14.90	14.90
November	13.70	14.60	14.60	14.90	14.90
December	13.70	14.60	14.60	14.90	14.90
Average	13.23	14.20	14.60	14.68	14.90
Equiv. Pd. Hrs.	2581	2701	2701	2764	2829
"What If?" Earnings	$ 34,147	$38,354	$ 39,435	$ 40,576	$42,152
Actual W-2 Earnings	$ 32,138	$35,594	$ 36,597	$ 37,679	$ 39,186
Difference	$ 2,009	$ 2,760	$ 2,838	$ 2,897	$ 2,966

	1988	1989	1990	1991
January	14.90	15.27	15.70	16.33
February	14.90	15.27	15.70	16.33
March	14.90	15.27	15.70	16.33
April	14.90	15.27	15.70	16.33
May	14.90	15.27	15.70	
June	14.90	15.27	15.70	
July	14.90	15.27	16.33	
August	15.27	15.70	16.33	
September	15.27	15.70	16.33	
October	15.27	15.70	16.33	
November	15.27	15.70	16.33	
December	15.27	15.70	16.33	
Average	15.05	15.45	16.02	16.33
Equiv. Pd. Hrs.	2412	2383	2535	882
"What If?" Earnings	$36,301	$36,823	$ 40,609	$ 14,404
Actual W-2 Earnings	$35,677	$36,823	$ 40,609	$ 14,404
Difference	$624	$ 0	$ 0	$ 0

FDH (homer3) 5/8/91

EXHIBIT C

JOHN TAYLOR'S HISTORY OF WAGE RATES (actual)

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
9/8/80	Hire Rate	6.50	6.50			
12/8/80	T-103		7.20			
3/2/81	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					

6/8/81	T-209	8.50	9.25		
9/7/81	T-212		9.50		
3/8/82	T-218		9.85	10.50	
9/6/82	T-224			10.80	
3/7/83	T-230			11.00	11.55
	T-312				
	T-318				
	T-324				
	T-330				
9/28/87	T-336				
	T-424				
	T-430				
	T-436				
5/7/90	T-442				

JOHN TAYLOR'S HISTORY OF WAGE RATES (actual)

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES				
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
9/8/80	Hire Rate	6.50					
12/8/80	T-103						
3/2/81	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
6/8/81	T-209						
9/7/81	T-212						
3/8/82	T-218						
9/6/82	T-224						
3/7/83	T-230		12.20	12.50			
	T-312						
	T-318						
	T-324						
	T-330						
9/28/87	T-336			13.85	14.19	14.59	
	T-424						
	T-430						
	T-436						
5/7/90	T-442					15.70	16.33

Actual Wage Rates (John Taylor)

	1983	1984	1985	1986	1987
January	10.80	11.55	12.20	12.20	12.50
February	10.80	11.55	12.20	12.20	12.50
March	11.00	11.55	12.20	12.20	12.50
April	11.00	11.55	12.20	12.20	12.50
May	11.00	11.55	12.20	12.20	12.50
June	11.55	11.55	12.20	12.20	12.50
July	11.55	12.20	12.20	12.20	12.50
August	11.55	12.20	12.20	12.20	12.50
September	11.55	12.20	12.20	12.20	12.50
October	11.55	12.20	12.20	12.50	13.85
November	11.55	12.20	12.20	12.50	13.85
December	11.55	12.20	12.20	12.50	13.85
Average	11.29	11.88	12.20	12.28	12.84
W-2 Earnings	$ 33,777	$ 30,084	$ 32,356	$ 33,777	$ 35,587
Equiv. Pd. Hrs.	2992	2532	2652	2751	2772

	1988	1989	1990	1991
January	13.85	14.19	14.59	16.33
February	13.85	14.19	14.59	16.33
March	13.85	14.19	14.59	16.33
April	13.85	14.19	14.59	16.33
May	13.85	14.19	15.70	
June	13.85	14.19	15.70	
July	13.85	14.19	16.33	
August	14.19	14.59	16.33	
September	14.19	14.59	16.33	
October	14.19	14.59	16.33	
November	14.19	14.59	16.33	
December	14.19	14.59	16.33	
Average	13.99	14.36	15.65	16.33
W-2 Earnings	$36,282	$38,167	$ 40,740	$ 15,471
Equiv. Pd. Hrs.	2593	2658	2603	947

FDH (taylor3) 5/8/91

JOHN TAYLOR'S "WHAT IF?" WAGE RATES (had he received same wage rates as Sonny Ard--and stayed on Curve 5)

PERSONAL ADJUSTMENTS			Sonny Ard's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
9/8/80	Hire Rate	6.50	6.50			
12/8/80	T-103		7.20			
3/2/81	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					
6/15/81	T-209		8.50	9.25		
	T-212					
	T-218					
	T-224					
	T-230					
9/7/81	T-312			9.85		
3/8/82	T-318			10.60	11.30	
	T-324					
	T-330					
	T-336					
9/6/82	T-424				12.15	
3/7/83	T-430				12.75	13.40
9/5/83	T-536					14.00
3/5/84	T-542					14.55
9/3/84	T-548					

PERSONAL ADJUSTMENTS			Sonny Ard's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES				
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
9/8/80	Hire Rate	6.50					
12/8/80	T-103						
3/2/81	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
6/15/81	T-209						

	T-212					
	T-218					
	T-224					
	T-230					
9/7/81	T-312					
3/8/82	T-318					
	T-324					
	T-330					
	T-336					
9/6/82	T-424					
3/7/83	T-430					
9/5/83	T-586					
3/5/84	T-542	15.30				
9/3/84	T-548	15.75	16.05	16.45	16.91	17.59

JOHN TAYLOR'S "WHAT IF?" WAGE RATES (had he received same wage rates as Sonny Ard--and stayed on Curve 5)

Sonny Ard's history of wage rates (Curve 5)	1983	1984	1985	1986	1987
January	12.15	14.00	15.75	15.75	16.05
February	12.15	14.00	15.75	15.75	16.05
March	12.75	14.55	15.75	15.75	16.05
April	12.75	14.55	15.75	15.75	16.05
May	12.75	14.55	15.75	15.75	16.05
June	13.40	14.55	15.75	15.75	16.05
July	13.40	15.30	15.75	15.75	16.05
August	13.40	15.30	15.75	15.75	16.05
September	14.00	15.75	15.75	15.75	16.05
October	14.00	15.75	15.75	16.05	16.05
November	14.00	15.75	15.75	16.05	16.05
December	14.00	15.75	15.75	16.05	16.05
Ard's Average Rate	13.23	14.98	15.75	15.83	16.05
Taylor's Equiv. Pd. Hr	2992	2532	2652	2751	2772
Taylor's "What If?"	$ 39,584	$ 37,929	$ 41,769	$ 43,548	$44,491
Taylor's					

Actual	$ 33,777	$ 30,084	$ 32,356	$ 33,777	$ 35,587
Difference	$ 5,807	$ 7,845	$ 9,413	$ 9,771	$ 8,904

	1988	1989	1990	1991
January	16.05	16.45	16.91	17.59
February	16.05	16.45	16.91	17.59
March	16.05	16.45	16.91	17.59
April	16.05	16.45	16.91	17.59
May	16.05	16.45	16.91	
June	16.05	16.45	16.91	
July	16.05	16.45	17.59	
August	16.45	16.91	17.59	
September	16.45	16.91	17.59	
October	16.45	16.91	17.59	
November	16.45	16.91	17.59	
December	16.45	16.91	17.59	
Ard's Average Rate	16.22	16.64	17.25	17.59
Taylor's Equiv. Pd. Hr	2593	2658	2603	947
Taylor's "What If?"	$ $42,058	$44,229	44,902	$ 16,658
Taylor's Actual	$36,282	$38, 167	$ 40,740	$ 15,471
Difference	$5, 776	$6,062	$ 4,162	$ 1,187

FDH (taylor3) 5/8/91

EXHIBIT D Revised

JOHNNIE PALMS' HISTORY OF WAGE RATES (actual)

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
9/8/80	Hire Rate	6.50	6.50			
12/8/80	T-103		7.20			

3/2/81	T-106	7.85				
	T-109					
	T-112					
	T-118					
	T-124					
6/8/81	T-209	8.50	9.25			
	T-212					
	T-218					
	T-224					
	T-230					
9/7/81	T-312		9.85			
3/8/82	T-318		10.60	11.30		
9/6/82	T-324			11.65		
3/7/83	T-330			12.00	12.60	
9/3/83	T-336				12.80	
4/10/89	Tech 3					

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES				
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
9/8/80	Hire Rate						
12/8/80	T-103						
3/2/81	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
6/8/81	T-209						
	T-212						
	T-218						
	T-224						
	T-230						
9/7/81	T-312						
3/8/82	T-318						
9/6/82	T-324						
3/7/83	T-330						
9/3/83	T-336			*13.10	13.41		
4/10/89	Tech 3				14.19	14.59	15.17

* Mr. Palms had been "on hold"; his next pay increase would have been when the top pay point on Curve 2 exceeded $ 12.80. However, since the plant was about to adopt a new progression system, we chose to give the same $ .30/hr. increase as others received.

Actual Wage Rates (Johnnie Palms)

	1983	1984	1985	1986	1987
January	11.65	12.80	12.80	12.80	13.10
February	11.65	12.80	12.80	12.80	13.10
March	12.00	12.80	12.80	12.80	13.10
April	12.00	12.80	12.80	12.80	13.10
May	12.00	12.80	12.80	12.80	13.10
June	12.60	12.80	12.80	12.80	13.10
July	12.60	12.80	12.80	12.80	13.10
August	12.60	12.80	12.80	12.80	13.10
September	12.80	12.80	12.80	12.80	13.10
October	12.80	12.80	12.80	13.10	13.10
November	12.80	12.80	12.80	13.10	13.10
December	12.80	12.80	12.80	13.10	13.10
Average	12.36	12.80	12.80	12.88	13.10
Actual W-2 Earnings	$ 31,385	$ 33,107	$ 34,031	$ 34,241	$ 37,856
Equiv. Pd. Hrs.	2540	2586	2659	2659	2890

	1988	1989	1990	1991
January	13.10	13.41	14.59	15.17
February	13.10	13.41	14.59	15.17
March	13.10	13.41	14.59	15.17
April	13.10	13.41	14.59	15.17
May	13.10	13.41	14.59	
June	13.10	13.41	14.59	
July	13.10	13.41	15.17	
August	13.41	14.59	15.17	
September	13.41	14.59	15.17	
October	13.41	14.59	15.17	
November	13.41	14.59	15.17	
December	13.41	14.59	15.17	
Average	1323	14.16	14.89	15.17
Actual W-2 Earnings	$31,187	$34,065	$ 34,265	$ 14,432
Equiv. Pd. Hrs.	2357	2405	2303	951

FDH (palm3) 5/28/91

JOHNNIE PALMS' "WHAT IF?" WAGE RATES (had he received same wage rates as Joseph Willard Parker)

PERSONAL ADJUSTMENTS			Joseph Willard Parker's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
1/14/80	Hire Rate	6.63				
3/24/80	T-103	7.25				
4/14/80	T-106	8.00	8.05			
	T-109					
	T-112					
	T-118					
	T-124					
	T-209					
	T-212					
10/20/80	T-218		9.10	9.85		
	T-224					
	T-230					
	T-312					
7/13/81	T-318			10.60		
	T-324					
	T-330					
	T-336					
1/11/82	T-424			11.40	12.15	
7/12/82	T-430				12.75	
1/10/83	T-436				13.05	13.70
7/11/83	T-442					13.85

PERSONAL ADJUSTMENTS			Joseph Willard Parker's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	6/25/81	9/29/86	8/1/88 7/2/90	7/31/89
1/14/80	Hire Rate	6.63				
3/24/80	T-103	7.25				
4/14/80	T-106	8.00				
	T-109					
	T-112					
	T-118					
	T-124					
	T-209					
	T-212					
10/20/80	T-218					

	T-224					
	T-230					
	T-312					
7/13/81	T-318					
	T-324					
	T-330					
	T-336					
1/11/82	T-424					
7/12/82	T-430					
1/10/83	T-436					
7/11/83	T-442		14.60	14.90	15.25 16.33	15.70

JOHNNIE PALMS' "WHAT IF?" WAGE RATES (had he received same wage rates as Joseph Willard Parker)

J. Willard Parker's history of wage rates (Curve 4)

	1983	1984	1985	1986	1987
January	13.05	13.85	14.60	14.60	14.90
February	13.05	13.85	14.60	14.60	14.90
March	13.05	13.85	14.60	14.60	14.90
April	13.05	13.85	14.60	14.60	14.90
May	13.05	13.85	14.60	14.60	14.90
June	13.70	13.85	14.60	14.60	14.90
July	13.85	14.60	14.60	14.60	14.90
August	13.85	14.60	14.60	14.60	14.90
September	13.85	14.60	14.60	14.60	14.90
October	13.85	14.60	14.60	14.90	14.90
November	13.85	14.60	14.60	14.90	14.90
December	13.85	14.60	14.60	14.90	14.90
Parker's Average Rate	13.50	14.23	14.60	14.68	14.90
Palms' Equiv. Pd. Hrs.	2540	2586	2659	2659	2890
Palms' "What If?"	$ 34,290	$ 36,799	$ 38,821	$ 39,034	$ 43,061
Palms' Actual	$ 31,385	$ 33,107	$ 34,031	$ 34,241	$ 37,356
Difference	$ 2,905	$ 3,692	$ 4,790	$ 4,793	$ 5,205

	1988	1989	1990	1991
January	14.90	15.25	15.70	16.33
February	14.90	15.25	15.70	16.33
March	14.90	15.25	15.70	16.33
April	14.90	15.25	15.70	16.33
May	14.90	15.25	15.70	
June	14.90	15.25	15.70	
July	14.90	15.25	16.33	
August	15.25	15.70	16.33	
September	15.25	15.70	16.33	
October	15.25	15.70	16.33	
November	15.25	15.70	16.33	
December	15.25	15.70	16.33	
Parker's Average Rate	15.05	15.55	16.02	16.33
Palms' Equiv. Pd. Hrs.	2357	2405	2303	951
Palms' "What If?"	$35,473	$37.133	$ 36,894	$ 15,530
Palms' Actual	$31,187	$34,065	$ 34,265	$ 14,432
Difference	$4,286	$3,068	$ 2,629	$ 1,098

FDH (palms3) 5/28/91

Exhibit E

GERRY PLANT'S HISTORY OF WAGE RATES (actual)

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
6/9/80	Hire Rate	6.50				
9/15/90	T-103	7.00	7.20			
12/8/80	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					
3/9/81	T-209		8.50			

	T-212					
	T-218					
	T-224					
	T-230					
6/8/81	T-312		9.05	9.85		
12/7/81	T-318			10.60		
6/7/82	T-324			10.95	11.65	
12/6/82	T-330				12.00	
6/6/83	T-336				12.15	12.80
	T-424					
	T-430					
	T-436					
11/9/87	T-442					

ACTUAL PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89
6/9/80	Hire Rate	6.50				
9/15/90	T-103	7.00				
12/8/80	T-106					
	T-109					
	T-112					
	T-118					
	T-124					
3/9/81	T-209					
	T-212					
	T-218					
	T-224					
	T-230					
6/8/81	T-312					
12/7/81	T-318					
6/7/82	T-324					
12/6/82	T-330					
6/6/83	T-336		13.55	13.85		
	T-424					
	T-430					
	T-436					
11/9/87	T-442			14.90	15.27	15.70*

*terminated 11/21/89

Actual Wage Rates (Gerry Plant)

	1983	1984	1985	1986	1987
January	12.00	12.80	13.55	13.55	13.85
February	12.00	12.80	13.55	13.55	13.85
March	12.00	12.80	13.55	13.55	13.85
April	12.00	12.80	13.55	13.55	13.85
May	12.00	12.80	13.55	13.55	13.85
June	12.80	12.80	13.55	13.55	13.85
July	12.80	13.55	13.55	13.55	13.85
August	12.80	13.55	13.55	13.55	13.85
September	12.80	13.55	13.55	13.55	13.85
October	12.80	13.55	13.55	13.85	13.85
November	12.80	13.55	13.55	13.85	14.90
December	12.80	13.55	13.55	13.85	14.90
Average	12.47	13.18	13.55	13.63	14.03
Actual W-2 Earnings	$ 33,826	$ 36,057	$ 40,077	$ 39,853	$ 43,640
Equiv. Pd. Hrs.	2713	2736	2958	2924	3110

FDH (plant3) 5/8/91

Actual Wage Rates (Gerry Plant)

	1988	1989
January	14.90	15.27
February	14.90	15.27
March	14.90	15.27
April	14.90	15.27
May 12.00	14.90	15.27
June	14.90	15.27
July	14.90	15.27
August	15.27	15.70
September	15.27	15.70
October	15.27	15.70
November	15.27	15.70
December	15.27	
Average	15.05	15.43
Actual W-2 Earnings	$ 38,699	$ 28,618

Equiv.
Pd. Hrs. 2571 1855

FDH (plant3) 5/8/91

GERRY PLANT'S "WHAT IF?" WAGE RATES (had he received same wage rates as Roy Peterson)

PERSONAL ADJUSTMENTS			Roy Peterson's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
12/3/79	Hire Rate	6.63				
3/3/80	T-103	7.25				
3/24/80	T-106	8.00				
9/8/80	T-109	9.00				
	T-112					
	T-209					
	T-212					
	T-218		9.10			
	T-224					
	T-230					
	T-312					
6/1/81	T-318		9.75	10.60		
	T-324					
	T-330					
	T-336					
11/30/81	T-424			11.40		
5/31/82	T-430			12.00	12.75	
11/29/82	T-436				13.35	
	T-442					
5/30/83	T-542				13.90	14.55
11/29/83	T-548					15.00

PERSONAL ADJUSTMENTS			Roy Peterson's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89
12/3/79	Hire Rate	6.63				
3/3/80	T-103	7.25				
3/24/80	T-106	8.00				
9/8/80	T-109	9.00				
	T-112					

	T-209					
	T-212					
	T-218					
	T-224					
	T-230					
	T-312					
6/1/81	T-318					
	T-324					
	T-330					
	T-336					
11/30/81	T-424					
5/31/82	T-430					
11/29/82	T-436					
	T-442					
5/30/83	T-542					
11/28/83	T-548		15.75	16.05	16.45	16.91

GERRY PLANT'S "WHAT IF?" WAGE RATES (had he received same wage rates as Roy Peterson)

Roy Peterson's history of wage rates (Curve 5)	1983	1984	1985	1986	1987
January	13.35	15.00	15.75	15.75	16.05
February	13.35	15.00	15.75	15.75	16.05
March	13.35	15.00	15.75	15.75	16.05
April	13.35	15.00	15.75	15.75	16.05
May	13.35	15.00	15.75	15.75	16.05
June	14.55	15.00	15.75	15.75	16.05
July	14.55	15.75	15.75	15.75	16.05
August	14.55	15.75	15.75	15.75	16.05
September	14.55	15.75	15.75	15.75	16.05
October	14.55	15.75	15.75	16.05	16.05
November	14.55	15.75	15.75	16.05	16.05
December	15.00	15.75	15.75	16.05	16.05
Average	14.09	15.38	15.75	15.83	16.05
Equiv. Pd. Hrs.	2713	2736	2958	2924	3110
"What If?" Earnings	$ 38,226	$ 42,080	$ 46,589	$ 46,287	$ 49,916
Actual W-2 Earnings	$ 33,826	$ 36,057	$ 40,077	$ 39,853	$ 43,640
Difference	$ 4,400	$ 6,023	$ 6,512	$ 6,434	$ 6,276

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Roy Peterson's history of wage rates (Curve 5)	1988	1989
January	16.05	16.45
February	16.05	16.45
March	16.05	16.45
April	16.05	16.45
May	16.05	16.45
June	16.05	16.45
July	16.05	16.45
August	16.45	16.91
September	16.45	16.91
October	16.45	16.91
November	16.45	16.91
December	16.45	
Average	16.22	16.62
Equiv. Pd. Hrs.	2571	1055

"What If?"		
Earnings	$ 41,702	$ 30,830
Actual W-2		
Earnings	$ 38,699	$ 28,618
Difference	$ 3,003	$ 2,212

FDH (plant3) 5/8/91

Exhibit F

IKE ROSS' WAGE RATES (had he remained employed on Curve 2 until resignation)

PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
6/9/80	Hire Rate	6.50				
10/6/80	T-103	7.00	7.20			
12/8/80	T-106		7.85			

3/9/81	T-109	8.05			
	T-112				
	T-118				
	T-124				
6/8/81	T-209	8.50	9.25		
9/7/81	T-212		9.50		
3/8/82	T-218		9.85	10.50	
9/6/82	T-224			10.80	
3/7/83	T-230			11.00	11.55

PERSONAL ADJUSTMENTS			EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	
6/9/80	Hire Rate	6.50				
10/6/80	T-103	7.00				
12/8/80	T-106					
3/9/81	T-109					
	T-112					
	T-118					
	T-124					
6/8/81	T-209					
9/7/81	T-212					
3/8/82	T-218					
9/6/82	T-224					
3/7/83	T-230		12.20	12.50	*12.81	

*resigned 7/31/89

IKE ROSS' WAGE RATES (had he remained employed on Curve 2 until resignation)

	1983	1984	1985	1986	1987
January	10.80	11.55	12.20	12.20	12.50
February	10.80	11.55	12.20	12.20	12.50
March	11.00	11.55	12.20	12.20	12.50
April	11.00	11.55	12.20	12.20	12.50
May	11.00	11.55	12.20	12.20	12.50
June	11.55	12.20	12.20	12.20	12.50
July	11.55	12.20	12.20	12.20	12.50
August	11.55	12.20	12.20	12.20	12.50
September	11.55	12.20	12.20	12.20	12.50
October	11.55	12.20	12.20	12.50	12.50
November	11.55	12.20	12.20	12.50	12.50
December	11.55	12.20	12.20	12.50	12.50
Average	11.29	11.93	12.20	12.28	12.50

Actual W-2 Earnings	$ 29,461	$ 29,834			
Equiv. Pd. Hrs.	2609	2501			

(NOTE: This information taken from second page--to calculate "Barry Equiv. Pd. Hrs.")

Barry W-2 Earnings	$ 36,495	$ 36,525	$ 37,632	
Barry Ave. Wage Rate	13.55	13.63	13.85	
Barry Equiv. Pd. Hrs.	2693	2680	2717	
Earnings (if Employed)	$ 32,859	$ 32,907	$ 33,964	

FDH (ross3) 5/8/91

	1988	1989	
January	12.50	12.81	
February	12.50	12.81	
March	12.50	12.81	
April	12.50	12.81	
May	12.50	12.81	
June	12.50	12.81	rehired 6/16/89
July	12.50	12.81	rehired 7/31/89
August	12.50		
September	12.50		
October	12.50		
November	12.50		
December	12.50		
Average	12.63	12.81	

(NOTE: This information taken from second page--to calculate "Barry Equiv. Pd. Hrs.")

Barry W-2 Earnings	$ 36,550	$ 21,199	$ 21,199 <--($36,341)(7/12)
Barry Ave. Wage Rate	13.99	14.19	
Barry Equiv. Pd. Hrs.	2613	1494	

Earnings (if Employed)	$ 32,997	$ 19,137

FDH (ross3) 5/8/91

IKE ROSS' "WHAT IF?" WAGE RATES (had he received same wage rates as Jerry Barry)

PERSONAL ADJUSTMENTS			Jerry Barry's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES			
EFFECTIVE DATE	PAY LEVEL	1980	10/6/80	6/15/81	6/7/82	6/13/83
6/9/80	Hire Rate	6.50				
9/15/80	T-103	7.00	7.20			
12/8/80	T-106		7.85			
	T-109					
	T-112					
	T-118					
	T-124					
3/9/81	T-209		8.50			
	T-212					
	T-218					
	T-224					
	T-230					
6/8/81	T-312		9.05	9.85		
12/7/81	T-318			10.60		
6/7/82	T-324			10.95	11.65	
12/6/82	T-330				12.00	
6/6/83	T-336				12.15	12.80

PERSONAL ADJUSTMENTS			Jerry Barry's history of wage rates: EFFECTIVE DATES OF GENERAL ADJUSTMENTS TO WAGE RATES				
EFFECTIVE DATE	PAY LEVEL	1980	6/25/84	9/29/86	8/1/88	7/31/89	7/2/90
6/9/80	Hire Rate	6.50					
9/15/80	T-103	7.00					
12/8/80	T-106						
	T-109						
	T-112						
	T-118						
	T-124						
3/9/81	T-209						
	T-212						
	T-218						
	T-224						

	T-230				
6/8/81	T-312				
12/7/81	T-318				
6/7/82	T-324				
12/6/82	T-330				
6/6/83	T-336	13.55	13.85	14.19 15.17	14.59

IKE ROSS' "WHAT IF?" WAGE RATES (had he received same wage rates as Jerry Barry)

Jerry Barry's history of wage rates (Curve 3)	1983	1984	1985	1986	1987
January	12.00	12.80	13.55	13.55	13.85
February	12.00	12.80	13.55	13.55	13.85
March	12.00	12.80	13.55	13.55	13.85
April	12.00	12.80	13.55	13.55	13.85
May	12.00	12.80	13.55	13.55	13.85
June	12.80	12.80	13.55	13.55	13.85
July	12.80	13.55	13.55	13.55	13.85
August	12.80	13.55	13.55	13.55	13.85
September	12.80	13.55	13.55	13.55	13.85
October	12.80	13.55	13.55	13.85	13.85
November	12.80	13.55	13.55	13.85	13.85
December	12.80	13.55	83.55	13.85	13.85
Barry's Average Rate	12.47	13.18	13.55	13.63	13.85
Barry's W-2 Earnings			$ 36,495	$ 36,525	$ 37,623
Ross' Equiv. Pd. Hrs.	2609	2501			
Ross' "What If?" Actual (if employed)	$ 32,534	$ 32,963	$ 36,495	$ 36,525	$ 37,632
Difference	$ 29,461	$ 29,834	$ 32,859	$ 32,907	$ 33,964
FDH (ross3) 5/8/91	$ 3,073	$ 3,129	$ 3,636	$ 3,618	$ 3,668

Jerry Barry's history of
wage rates
(Curve 3)

	1988	1989	
January	13.85	14.19	
February	13.85	14.19	
March	13.85	14.19	
April	13.85	14.19	
May	13.85	14.19	
June	13.85	14.19	
July	13.85	14.19	
August	14.19		
September	14.19		
October	14.19		
November	14.19		
December	14.19		
Barry's Average Rate	13.99	14.19	
Barry's W-2 Earnings	$ 36,550	$ 21,199	<--($36.341(7/12)
Ross' Equiv. Pd. Hrs.			
Ross' "What If?"	$ 36,550	$ 21,199	
Actual (if employed)	$ 32,997	$ 19,137	
Difference	$ 3,553	$ 2,062	

FDH (ross3) 5/8/91

EXHIBIT A-1

DOLLAR DIFFERENCES BETWEEN ACTUAL EARNINGS
AND "WHAT IF" EARNINGS

PLAN YEAR	HERRING 253-02-4219 DOE 6/9/80	TAYLOR 254-64-6537 DOE 9/8/80	PLANT 257-13-8776 DOE 6/9/80	ROSS 254-86-9910 DOE 6/9/80	PALMS 259-66-8361 DOE 9/8/80
1983	$ 634.25	$ 1,304.77	$ 872.79	$ 620.62	$ 823.61
1984	2,868.48	5,657.74	4,756.33	2,711.92	2,533.02
1985	3,105.24	8,149.82	5,553.48	3,232.08	4,259.52
1986	3,167.40	8,612.88	5,415.72	3,191.28	4,201.68

1987	3,017.40	8,218.80	5,419.44	3,042.84	4,180.44
1988	1,180.68	5,764.47	3,575.72	3,091.92	3,767.28
1989	1,476.80	5,042.62	2,471.07	3,021.64	3,835.81
1990	0.00	5,016.92	1,010.76	0.00	1,951.76
1991	0.00	2,434.80	0.00	0.00	2,381.60

PLAN YEAR	HOMER 255-76-7673 DOE 7/7/80
1983	$ 591.58
1984	2,144.66
1985	2,515.44
1986	2,510.76
1987	2,486.52
1988	1,828.89
1989	0.00
1990	0.00
1991	0.00

ADDITIONAL CONTRIBUTIONS WHICH WOULD HAVE BEEN MADE
BASED ON ADDITIONAL "WHAT IF" EARNINGS

Balance 5/15/91					
Cash	$ 24.15	$ 150.23	$ 63.37	$ 27.88	$ 68.85
Common Stock	47.146	126.498	85.100	54.410	66.896
Preferred Stock	0.000	3.572	0.769	0.000	1.388
Sub-Total Valuation	$ 3,905.21	$ 10,857.59	$ 7,132.11	$ 4,506.91	$ 5,689.99
Deduction			-1,000.00		
Total	$ 3,905.21	$ 10,857.59	$ 6,132.11	$ 4,506.91	$ 5,689.99

Balance 5/15/91	
Cash	$ 19.09
Common Stock	37.149

Preferred Stock	0.000
Sub-Total Valuation	$ 3,077.20
Deductions	
Total	$ 3,077.20

OPINION FOOTNOTES

n1

YEAR	BACK PAY AWARD
1983	$ 4,843
1984	7,845
1985	9,413
1986	9,771
1987	8,904
1988	5,776
1989	6,062
1990	4,162
1991	1,187
Subtotal	$ 57,963
Deduction	-0-
Total Back Pay Award	$ 57,963

n2

YEAR	BACK PAY AWARD
1983	$ 2,168
1984	3,239
1985	3,482
1986	3,550
1987	2,906
1988	896
1989	1,269
1990	-0-
1991	-0-
Subtotal	$ 17,510
Deduction	-0-
Total Back Pay Award	$ 17,510

n3

YEAR	BACK PAY AWARD
1983	$ 2,421
1984	3,692
1985	4,790
1986	4,793
1987	5,205
1988	4,286
1989	3,068
1990	2,629
1991	1,098
Subtotal	$ 31,982
Deduction	-0-
Total Back Pay Award	$ 31,982

n4

YEAR	BACK PAY AWARD
1983	$ 1,674
1984	2,760
1985	2,838
1986	2,897
1987	2,966
1988	624
1989	-0-
1990	-0-
1991	-0-
Subtotal	$ 13,759
Deduction	-0-
Total Back Pay Award	$ 13,759

n6

YEAR	BACK PAY AWARD
1983	$ 3,300
1984	6,023
1985	6,512
1986	6,434
1987	6,276
1988	3,003
1989	2,212
1990	-0-
1991	-0-

Subtotal	$ 33,760
Deduction	10,000
Total Back Pay Award	$ 23,760

n6

YEAR	BACK PAY AWARD
1983	$ 2,305
1984	3,129
1985	3,636
1986	3,618
1987	3,668
1988	3,553
1989	2,062
1990	-0-
1991	-0-
Subtotal	$ 21,971
Deduction	-0-
Total Back Pay Award	$ 21,971

n7 Section 1821 provides in relevant part:

(b) A witness shall be paid an attendance fee of $ 30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

n8

TOTAL ATTORNEY'S FEES

Attorney's fees and reasonable expenses:	$ 229,062.53
Legal support staff fees and reasonable expenses:	$ +8,957.81
SUBTOTAL:	$ 238,020.34
Less previously awarded interim attorney's fees:	$ -62,500.00
TOTAL	$ 175,520.34

APPENDIX E: DENIAL OF MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC

(FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT FEB 8, 1994, MIGUEL J. CORTEZ CLERK)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8378, et al.

ISSIAH ROSS, JR., et al.,

Plaintiffs-Appellants,

versus

BUCKEYE CELLULOSE CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, Circuit Judge, HILL AND ESCHBACK*, Senior Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON

*Hon. Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX F

DO NOT PUBLISH

(FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APRIL 20,1994
MIGUEL J. CORTEZ
CLERK)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 93-8136

D.C. Docket No. CIV89-240-3-MAC

NANNETTE HILL TYSON; GEORGE EARNEST RUMPH,

Plaintiffs-Appellants,

versus

PROCTER AND GAMBLE CELLULOSE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia
(April 20, 1994)

Before KRAVITCH and BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

Appellants Tyson and Rumph, employees of Procter & Gamble, contend that certain of appellee Procter & Gamble's wage practices constitute wage discrimination violative of Title VII of the Civil Rights Act of 1964, as amended,42 U.S.C. Section 2000 et seq. For the reasons below, and based on our disposition of identical allegations in Ross v. Buckeye Cellulose Corp., 980 F.2d. 648 (11th Cir. 1993), we AFFIRM the district court's holding that appellants' claims are time-barred.

I.

Procter & Gamble Cellulose Corporation, formerly known as Buckeye Cellulose Corporation, is an Ohio corporation licensed to do business in the state of Georgia. Both appellants are black

Georgia residents employed at a paper-processing plant in Macon County, Georgia, owned by Procter & Gamble. For a complete description of this plant's operations, see Ross v. Buckeye Cellulose Corp., 733 F. Supp. 344, 347-48 (M.D. Ga. 1989), aff'd in part, 980 F.2d 649 (11th Cir. 1993).

Appellants contend that Procter & Gamble's method of setting wages at the plant, known as the "Pay and Progression System" (P & P System"), is racially discriminatory under Title VII. The sole issue on appeal is whether appellants' Title VII disparate impact claims are time-barred based on 42 U.S.C. Section 2000e-5(e)-1[1] and this court's analysis in Ross, 980 F.2d at 660 (rejecting as time-barred identical Title VII disparate impact claims brought by appellants' co-workers).

II.

In Ross, thirteen employees, including Tyson and Rumph, brought suit against Procter and Gamble alleging, inter alia, that the P & P System was operated in a racially discriminatory fashion. Tyson and Rumph pursued their claims in Ross

only under Section 1981, because they had not received the EEOC right to sue letter that is a prerequisite to bringing a Title VII claim.[2] Other plaintiffs in Ross, however, advanced claims pursuant to both 42 U.S.C. Section 1981 and Title VII.

This court held in Ross that the employees' Title VII disparate impact challenges to the P & P System were time-barred, because they were not brought within the 180 limitations period codified at 42 U.S.C. Section 2000e-5(e). 980 F2d at 660. In doing so, we held that the limitations period for such an action began to run in October 1984, the date on which the P & P System was frozen and thus the last possible date of wage discrimination under the System. Id.

In the present case, it is undisputed that appellants filed their charges with the EEOC more than180 days after the P & P System's wage freeze in October 1984. See Order of District court at 9 (Jan. 22, 1993). The district court therefore held that appellants' Title VII claims were time-barred under 42 U.S.C. Section 2000e-5(e)-1 and the analysis in Ross.

Appellants ask this court to reconsider

BEST AVAIL

our holding in Ross, insofar as Ross set October 1984 as the date activating the 180 days limitations period in which claimants might file EEOC charges challenging the System. Appellants contend that Ross is in conflict with Bazemore v. Friday, 478 U.S. 185 (1986).

We squarely rejected an identical argument in Ross. See 980 F.2d at 659 n.17. The doctrine of *stare decisis* binds us to our decision in Ross, "absent a countervailing decision by the Supreme Court or by this Court sitting en banc." Ransom v. S & S Food Center, Inc. of Florida, 700 f.2d 670, 674 (11th Cir. 1983). Because it is undisputed that appellants filed their EEOC charges beyond the 180 days limitations period, the district court's grant of summary judgment to Procter & Gamble is AFFIRMED.[3]

NOTES:

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[1]Title 42 U.S.C. Section 2000e-5(e)-1 requires an employee to file discrimination charges with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." Disposition of such charges by the EEOC is a prerequisite to a Title VII

ABLE COPY

action.

[2]Appellants eventually received their EEOC right to sue letters on April 25, 1989. The letters dismissed appellants' charges of discrimination based on lack of jurisdiction and noted that appellants had "filed a private lawsuit." As to appellants' Section 1981 claims, a jury returned a verdict for the defendant.

[3]We note that insofar as the complaint alleges Title VII violations arising out of distinct acts committed in 1989 and 1991 (see complaint pars. 18-20, 24-26), such claims are time-barred, no EEOC charges having been filed as to those asserted violations.

(4)

No. 93-1903

Supreme Court, U.S.
FILED
JUN 30 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ISSIAH ROSS, JR., TABITHA HERRING, JAMES C. HOMER, JOHNNIE LEE PALMS, GERRY PLANT, WILLIAM MORGAN PORTER, VERNON ALEXANDER PUTMAN, GEORGE RUMPH, FRANKLIN ROOSEVELT SCOTT, EDDIE SLAUGHTER, JOHN W. TAYLOR, NANNETTE TYSON and HOSEY J. WHITE, JR.,

Petitioners,

v.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN G. SKINNER
(Counsel of Record)

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Attorney for Respondent

39 pp

QUESTIONS PRESENTED†

1. Whether a defendant in a discriminatory-treatment case under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 is required to produce any specific type of evidence to rebut a *prima facie* case of discrimination when it articulates legitimate, non-discriminatory reasons for the actions it has taken.

2. Whether a district court's exercise of its broad discretion to exclude testimony regarding terminations and other alleged discriminatory conduct which occurred at a different plant and occurred years prior to the start-up of the plant where the plaintiffs were employed constitutes reversible error.

3. Whether a plaintiff alleging disparate impact under Title VII must have filed a charge of discrimination with the EEOC within 180 days of the last day on which the challenged neutral policy was applied.

†One of Petitioner's Questions Presented, namely, question number 10, is not addressed in this brief. Respondent does not concede its validity but submits that it is more than adequately answered by the Eleventh Circuit.

RULE 29.1 LISTING

The parent company of Respondent, The Buckeye Cellulose Corporation (now known as The Procter & Gamble Cellulose Company), is The Procter & Gamble Company. The Procter & Gamble Cellulose Company has one subsidiary, Procter & Gamble Cellulose (1988), Ltd.

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REASONS FOR DENYING THE WRIT 11

1. No Decision Of This Court Or Of Any Court Of Appeals Requires A Defendant, When Articulating Legitimate, Non-discriminatory Reasons For The Actions Taken, To Produce A Specific Type Of Evidence To Rebut A Plaintiff's *Prima Facie* Case Of Intentional Discrimination Under Title VII Or § 1981. 11

2. District Courts Retain Broad Discretion Under Rule 403 To Exclude Evidence Where The District Court Has Found That The Probative Value Is Substantially Outweighed By the Danger Of Unfair Prejudice, Confusion Or Misleading A Jury Or Will Cause Undue Delay In The Adjudication Of The Case. 15

3. Since All Of The Plaintiffs Failed To File A Charge Of Discrimination With The EEOC Within 180 Days Of The Last Application Of The Neutral Policy, *i.e.*, Receipt Of Their Last Career

Plan, Their Claims Of Disparate Impact Under Title VII Are Time Barred. 20

A. The Acts Complained Of By Plaintiffs Do Not Constitute A Continuing Violation. ... 23

B. Since The Plaintiffs In This Case Had Ample Information Months, If Not Years, Prior To The Dates On Which They Filed Their Charges Of Discrimination, There Is No Basis For Tolling The Statute Of Limitations. 27

C. The Statute Of Limitations Defense Was Not Waived. 28

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No. 93-1903

In The

Supreme Court of the United States

October Term, 1993

ISSIAH ROSS, JR., TABITHA HERRING, JAMES C. HOMER, JOHNNIE LEE PALMS, GERRY PLANT, WILLIAM MORGAN PORTER, VERNON ALEXANDER PUTMAN, GEORGE RUMPH, FRANKLIN ROOSEVELT SCOTT, EDDIE SLAUGHTER, JOHN W. TAYLOR, NANNETTE TYSON and HOSEY J. WHITE, JR.,

Petitioners,

v.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondent, Buckeye Cellulose Corporation, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 980 F.2d 648 (1993).

STATUTORY PROVISIONS

In addition to 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, *et seq.*, Respondent submits that Rule 403 of the Federal Rules of Evidence is significant.

> **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Since both procedural and evidentiary facts are relevant to this case, Buckeye will present both a procedural history and succinct summary of some of the record evidence pertinent to the issues involved in this Petition.

A. History Of Procedural Developments.

On August 23, 1985, Eddie Slaughter,[1] an employee at Buckeye Cellulose Corporation's Flint River plant,[2] filed a race discrimination suit under Title VII and § 1981 in the Northern

[1]All of the Petitioners are current or former employees at Buckeye's plant located in Oglethorpe, Georgia. In most cases throughout this brief, the Petitioners shall be referred to, either individually or collectively, as Plaintiffs. If it is necessary to identify any particular plaintiff or plaintiffs, they shall be referred to by name.

[2]Respondent's corporate name was changed in 1988 to "The Procter & Gamble Cellulose Company." Hereinafter, the Respondent shall be referred to as Buckeye.

District of Georgia. On March 7, 1986, Issiah Ross, Jr., filed a similar suit in the Middle District of Georgia. On December 19, 1986, eleven additional identical suits were filed in the Southern District of Georgia.[3]

In mid-1987, Buckeye filed a motion to consolidate the cases.[4] Since Plaintiffs opposed consolidation, the district court issued an order on February 11, 1988, confirming that one case, *Ross v. Buckeye*, would be tried separately and in its entirety before the motion as to consolidation of the remaining cases would be addressed.[5] The *Ross* trial commenced on June 6, 1988. After several days of testimony, the district court concluded that the other cases should be consolidated and declared the June 6 trial a mistrial.

During the course of the June 6 trial, Plaintiffs attempted to offer into evidence testimony regarding events which occurred at a Buckeye plant located in Foley, Florida. When Buckeye objected to this evidence, there was a chambers conference[6] to review in detail the admissibility of any evidence regarding the Foley plant. The district court sustained the objection and ruled that the evidence would not be admitted.

The district court set September 6, 1988, as the trial date for the consolidated cases. On August 31, 1988, there was a

[3]All of the suits filed outside the Middle District of Georgia were transferred to that District.

[4]R1-11. Buckeye will cite to the record on appeal following the same record designations it used in its briefs to the Eleventh Circuit. All pleadings, discovery, hearing and jury trial transcripts, and all exhibits admitted into evidence during the proceedings in these cases were made part of the record on appeal.

[5]R2-38.

[6]R10-84-1-2. Though the content of this conference was not transcribed, it is clear that this evidentiary issue was raised and analyzed by the district court. The importance of this being that, as early as June of 1988, the district court was already well aware of the issues in the case and the evidence which Plaintiffs wanted to introduce regarding the Foley plant.

status conference regarding the consolidated cases. At this status conference, the district court and Buckeye were made aware of the suit filed by Rumph and Tyson alleging violations of § 1981.[7]

During the course of this August 31, 1988 status conference, two significant issues directly related to this Petition were raised. The first issue, namely, the admissibility of evidence concerning what had allegedly occurred at the Foley plant, via testimony of Jimmy Hughes, was discussed. Buckeye again objected to the admissibility of the evidence and what Hughes had to say regarding the Foley plant. In response to this objection, the district court noted that it had previously ruled that such evidence would not be admitted. The second issue concerned disparate impact. In response to a question from the district court, Buckeye's counsel responded, "I don't think [Plaintiffs have] any basis for recovering under career plans since that is clearly outside the statute of limitations."[8] Thus, Plaintiffs were on notice that Buckeye intended to pursue the statute of limitations defense.

The jury trial segment of the consolidated cases, which by this time had become known as *Ross, et al.*, did begin on September 6, 1988.[9] The jury trial continued throughout the months of September, October, November and December of 1988. Throughout those four months, testimony and other evidence was presented during nearly sixty actual days of trial. The transcript of this part of this case exceeded 10,000 pages. Seventy-three witnesses testified and over 500 exhibits were admitted into evidence.

[7]This joint action was filed on August 28, 1988.

[8]R11-156-4.

[9]Rumph's and Tyson's § 1981 cases were also consolidated for trial. Two of the original cases were excluded from the consolidation for reasons not relevant to this Petition. Thus, the thirteen cases of the Petitioners listed in this case were the ones which proceeded to trial.

Prior to the conclusion of the jury trial portion of this case, the district court, on December 12 and 13, 1988, advised the parties that the Title VII disparate impact segment of the case would not be concluded at the end of the § 1981 jury trial. The district court specifically stated that it intended to hold additional evidentiary hearings regarding the disparate impact theory. The district court also explained that it would require both oral arguments and briefs concerning disparate impact.[10]

At the conclusion of Buckeye's case at the jury trial, Buckeye filed a motion for directed verdict and a lengthy memorandum in support of its motion.[11] Buckeye moved, *inter alia*, for dismissal of the § 1981 claims since they did not constitute continuing violations and because they were separate, distinct acts which fell outside of the statute of limitations applicable to § 1981.

On May 1 and 2, 1989, the district court heard additional testimony regarding disparate impact. On June 28, 1989, oral arguments regarding the disparate impact theory were conducted. The parties also briefed the disparate impact issue. The parties later briefed the issue as to liability under the disparate impact theory. On September 24, 1990, a hearing was held regarding damages for those six Plaintiffs whom the district court had found to have been disparately impacted.[12] Final judgment was entered in these cases on June 28, 1991.[13]

B. Record Evidence Developed During Proceedings.

During the course of the jury trial, the entire history of the Flint River plant was developed since it related directly to the pay issues. Parts of that history relevant to the present case show that the Flint River plant was a new facility. The first

[10]R55-8922-24; R56-9235.

[11]R3-95-14-16.

[12]1SR3/1991-220-1.

[13]1SR2/1991-255-1.

employees[14] were hired on December 3, 1979. The majority of the workforce was hired in the Summer of 1980.

The Flint River plant was operated under what is known as a "technician" system, which included, among other unique aspects, a non-traditional pay system which was specifically designed to break away from strict job classifications and designed to offer varying job responsibilities to the employees.[15]

The initial step in accomplishing this occurred during the hiring process. Applicants were offered a job in either maintenance or process. Process included all jobs at the plant except maintenance or clerical positions. Other than that basic hiring delineation, no applicant was hired for a specific job or a specific unit.[16] After being hired, each employee went through an extensive 10-13 week orientation process to familiarize the employee with the various operating units and the numerous job functions within those units, as well as introduce the employees to the concept of the technician system, career plans and the unique pay system.[17] Each member of each hire group went through this orientation process, both in large and small group meetings.[18] The new employees were told that some job functions were more important than others and, as a result, there would need to be more skills in a career plan in units with less valuable skills in order to match the pay in the other units that had more valuable skills.[19]

[14]The Flint River non-management employees were referred to as "technicians." Thus, the term "technician" and employee are synonymous and may appear in either form throughout this case.

[15]R53-8492-8525; R45-6947-7004.

[16]Unit is the term Buckeye used to designate a specific area of the plant. The term "unit" is the equivalent of the more traditional designation of department.

[17]R45-6958-70; Exhibit D-45.

[18]R37-5505, 5570-71.

[19]R37-5505-06; 5571.

There were numerous job assignments for each operating unit. For the entire plant, there were forty specific job functions directly related to production work. These were known as "skills" or "skill areas." In addition to the production skills, there were job assignments known as "support skills." There were thirteen support skills.[20] During the plant's initial start-up, each employee was performing one of these "skill areas." It was during the first career planning procedure that the employees became eligible to have several "skill areas" placed in their career plans.

In preparation for the first career planning process, all of the various components of the pay system were covered with all employees during four different plantwide training meetings.[21] By April and May of 1981, all employees were provided with examples of career plans and what pay curve could be expected from such a career plan.[22] All employees also knew at this early date that career plan revisions could result in assignment to a higher or lower pay curve depending on the value of the revised career plan.[23] Thus, when the first career planning process actually began in the Summer of 1981, all of the employees had a detailed understanding of how the pay system was designed and how it would work.

A "career plan" identified the specific skill areas which the employees were expected to learn. The career plan was an official document. This one-page document listed each specific skill area to which an employee was assigned. Each career plan had a specific effective date and an employee's job responsibilities did not change unless the career plan was changed. The career plan was reviewed with each employee and made a

[20]D-12.

[21]R45-6692-93.

[22]R46-7076.

[23]Exhibit D-46.

permanent part of the employee's personnel file.[24] Each employee received a career plan which applied only to that employee. Though two or more employees could have the same or similar career plans, it was the specific career plan assigned to a specific employee which determined what that employee's pay was going to be. Pay was based on the value of each career plan.

Many factors went into determining what skill areas would be assigned to any given career plan. The system was designed to have employees add to their initial job assignment by learning related jobs within the confines of Buckeye's needs to run the business. In order to do this, each unit developed an "ideal team skill mix" which identified the staffing needs over an eighteen to twenty-four month period.[25]

The next step, after the career planning process had been explained to all of the employees, was to begin gathering information regarding each employee's performance during the first year of employment.[26] Performance played an integral part in determining what skills would be included in a career plan. In addition, each employee was interviewed by his or her manager to determine what the employee was interested in learning. Employee preference was also an important part in assigning the various skill areas to be contained in a career plan.

[24]Every available career plan for every employee, either current or terminated, was introduced into evidence.

[25]The ideal team skill mix is analogous to a manning schedule. This determines how many skills are needed to properly run a shift. These skills were then allocated to the employees on a per-team, per-unit basis.

[26]This was confirmed by the testimony of those managers who were at the plant during the initial career planning process. *See, e.g.,* Miller at R45-7014-15; McDermott at R53-8500-03; Aiken at R53-8565-66; Hart at R47-7241; Sims at R37-5509-10; Johnson at R50-7842-43; Peters at R42-6469-84.

After the completion of all of these procedures, all employees received their official career plan. After the career planning process was completed, each career plan was reviewed with each individual employee and with all other employees on that employee's team.[27] Thus, all of the employees on any given team knew the content of the career plans of each of the other team members.[28]

Prior to the second plantwide career planning session, several things had transpired. First, the ideal skill mix for each team was re-examined and redefined. Also, the pay system was changed by providing a point value to each of the skill areas. The "point" system provided management with a more accurate means of valuing and costing the career plans.[29]

In the Summer of 1982, all employees went through a second career planning. This second career planning followed the same procedures as did the first. Each employee was interviewed by his or her team manager to ascertain what skills the employee, based on qualifications and the employee's performance, might be interested in acquiring. The skills available were, as was true during the first career planning session, determined by the ideal team skill mix. The proposed career plan was then submitted to the unit management team for review to ensure that the new career plan was appropriate for the employee and reflected the employee's skills, abilities and performance in comparison with the other employees in the unit.[30]

[27]The term "team" as used by Buckeye is not the typical euphemism used at many plants. In general, each unit at the Flint River plant had four teams. Each team represented that group of employees who were needed to operate the plant during any given shift. Each team consisted of fifteen to twenty employees.

[28]Exhibit D-50 at 8, 10, 14; R42-6478.

[29]R53-9406-98; R54-8831-32.

[30]R48-7453-81; Exhibit D-1 at 30-36, 47.

The decision as to what career plan would be assigned to any specific employee was not made by an individual member of management. All career plans were initially reviewed and prepared by the team manager of the team to which an employee was assigned. After that, all of the career plans for all of the teams in a given unit were presented to and reviewed by the unit management team which consisted of all of the managers assigned to that unit. After the unit management team had reviewed the proposed career plans, they were submitted to the Pay and Progression Review Board, which consisted of representatives from each unit and representatives from the Industrial Relations Department (IRD). There was, therefore, no single individual which was responsible for making the decision as to what career plan an employee would receive.

For various reasons, including a failure to achieve anticipated production results, the pay system was put on hold. As a result, the career planning process was abolished. This freeze of the pay system applied to every employee in the plant. The only changes in pay after that point, until after 1987, were across-the-board increases which applied equally to everyone.

Throughout the course of the jury trial, numerous managers, including team managers, unit managers, IRD managers and the plant manager, provided evidence regarding now only how the career planning process was carried out but also provided specific information as to why various Plaintiffs received the career plan that he or she received. The entire personnel file of each Plaintiff, as well as those of many other employees, were also introduced into evidence. Numerous witnesses for Buckeye, both management and non-management employees, provided testimony regarding information contained in the personnel files, as well as other information relating to the job performance of the Plaintiffs and other employees. In addition, all of the Plaintiffs testified at length as to why they thought they should have received a better career plan than that actually received.

REASONS FOR DENYING THE WRIT

1. No Decision Of This Court Or Of Any Court Of Appeals Requires A Defendant, When Articulating Legitimate, Non-discriminatory Reasons For The Actions Taken, To Produce A Specific Type Of Evidence To Rebut A Plaintiff's *Prima Facie* Case Of Intentional Discrimination Under Title VII Or § 1981.

This Court, in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. —, 113 S. Ct. —, 125 L. Ed. 2d 407 (1993), re-examined and explained in detail the "burden" placed on a defendant when it articulates its legitimate, non-discriminatory reasons for the actions taken in regard to a § 1981 discriminatory-treatment plaintiff.[31] Though there was obviously disagreement as to the significance of the rebutting evidence, this Court confirmed that twenty years of precedent still only requires a defendant to articulate a legitimate, non-discriminatory reason for the actions it has taken in regard to a plaintiff. Thus, the legal principles established in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), are as viable now as they were on the days when the decisions were rendered.

It is clear, therefore, that once a plaintiff has established a *prima facie* case of discrimination, the employee's burden is merely "to articulate some legitimate, non-discriminatory reason" for its adverse employment action to rebut any inference of discrimination. *McDonnell Douglas*, 411 U.S. at 802. As this Court stated in *Burdine*:

[31]This Court clarified in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that the Court's framework for allocation of the burden of production and the order for presentation of proof in Title VII claims is also applicable to § 1981 claims.

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons.[32]

This Court in *Hicks*, in both the majority and dissenting opinions, confirmed the former holdings that this "shift" does not in any way affect the plaintiff's ultimate burden. The *Hicks* Court noted:

> It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff,". . . .[33]

Despite this Court's clear explanations of a defendant's burden of production, Plaintiffs now argue that, because Buckeye did not present a specific type of evidence during the § 1981 jury trial, the district court erred in not granting their motions for directed verdict or J.N.O.V.

In denying Plaintiffs' motions, the district court observed,

> Without now regurgitating over three months of trial testimony and evidence, the court finds that the evidence and inferences do not point so strongly in Plaintiffs' favor that reasonable minds could not reach a contrary verdict. *Fair-minded, impartial men could*

[32] *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254.

[33] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. —, 113 S. Ct. —, 125 L. Ed. 2d at 416 (emphasis in original).

> *easily reach the verdict reached by the jurors in these actions.*[34]

On appeal, the Eleventh Circuit noted that Plaintiffs admitted that Buckeye introduced evidence explaining why it had taken various actions in regard to the Plaintiffs and why the Plaintiffs were given the career plans that they were given, which, in turn, ultimately resulted in Plaintiffs receiving the pay which they received. Based on those facts, the Eleventh Circuit reiterated the district court's finding that the record in the case made it abundantly clear that the case was properly before the jury to determine whether or not the Plaintiffs had been subjected to intentional discriminatory treatment.[35]

It is fatal to Plaintiffs' Petition on this issue that Plaintiffs' arguments are not arguments of law but are only arguments of fact. Plaintiffs are asking this Court to review the facts, the very same facts which were presented to the jury, and then reach its own conclusion as to whether or not the jury was correct in finding that Buckeye had not intentionally discriminated against the eleven Plaintiffs on whose behalf this § 1981 issue has been raised. In effect, Plaintiffs are asking this Court to sit as a trier of fact. It goes without saying this is an untenable position.

Plaintiffs do not contend that Buckeye did not articulate some reasons for the actions it took. Nor do Plaintiffs contend that the jury, the district court or the Eleventh Circuit found that these articulated reasons were not the true reasons for the actions taken by Buckeye. Plaintiffs merely claim that Buckeye cannot rebut a *prima facie* case because it did not produce a "decisionmaker" as to why the Plaintiffs were paid the way that

[34]Order dated April 10, 1989. R4-141-3. (Emphasis added).

[35]Appendix Vol. 1 at 22-23.

they were. Even if this statement were true, which it is not,[36] Plaintiffs still have provided no support for a contention that either the district court or the Eleventh Circuit failed to properly apply the mandates of this Court in *McDonnell Douglas*, *Burdine* and *Hicks*.

Plaintiffs have failed to cite any case authority for the position that they now take. The authority cited by Plaintiffs does not support their unique theory. Indeed, for the most part, the cited authority is not even relevant to the issue.[37] Curiously, the one case of possible significance cited by Plaintiffs does not support their position but that of Buckeye. In *Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir. 1983), the court noted, "The defendant's evidence is sufficient if it 'raises a genuine issue of fact as to whether it discriminated against the plaintiff'. The defendant must raise an issue of fact by means of admissible evidence, however, and averments in pleadings are insufficient."[38] Thus, the Eleventh Circuit made it abundantly clear that a defendant's burden is only of production and not a heavy burden. Indeed, the only requirement is that a defendant present "admissible evidence" as to the actions it took.

[36]The record in this case contains page after page of testimony of the managers who were involved in the career planning process who explained in detail exactly how that was done and why the Plaintiffs received the career plans that they received. Since the Plaintiffs' pay was tied directly to the career plan, there is no question but that the "decision-makers" did testify as to why the Plaintiffs received the pay that they did. As noted by the Eleventh Circuit, "The transcript of the four-month trial. . .is full of conflicting testimony regarding the motivations of Buckeye's decision-makers." (Appendix Vol. 1 at 23).

[37]*Mitchell v. Baldridge*, 759 F.2d 80 (D.C. Cir. 1985)(F.R.C.P. 41(b) motion at end of plaintiff's case); *Nantz v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1991)(defendant offered no reason for action taken); *EEOC v. American Nat'l Bank*, 652 F.2d 1176 (4th Cir. 1981)(pattern and practice disparate impact case).

[38]*Lincoln v. Board of Regents*, 697 F.2d at 937. (Citations omitted).

There is no question from either the district court's orders or the Eleventh Circuit's decision that Buckeye met this burden. Plaintiffs are simply complaining that the jury reached an unfavorable verdict, yet, the arguments that Plaintiffs raise here are the exact same arguments that they presented to the jury. The jury rejected those arguments, as did the district court and the Eleventh Circuit.

The cases cited by Plaintiffs do not suggest any conflict in the circuits regarding the proper interpretation or application of relevant case law and the Eleventh Circuit's holding in this case. In fact, to find Plaintiffs' arguments tenable would call for not only a reversal of hundreds of decisions of the various circuits but also reversal of this Court's holdings in *McDonnell Douglas*, *Burdine* and *Hicks*. Plaintiffs are suggesting that there is some bright line standard for measuring the sufficiency of the evidence establishing a defendant's legitimate, non-discriminatory reasons for the actions taken. This bright line standard can then be used to not only, as a matter of law, establish pretext but also, as a matter of law, relieve a plaintiff of its ultimate burden of establishing that the complained of acts were intentionally discriminatory. Such reasoning would truly set aside "two decades of stable law in this Court. . . ."[39]

2. District Courts Retain Broad Discretion Under Rule 403 To Exclude Evidence Where The District Court Has Found That The Probative Value Is Substantially Outweighed By the Danger Of Unfair Prejudice, Confusion Or Misleading A Jury Or Will Cause Undue Delay In The Adjudication Of The Case.

Plaintiffs have misunderstood or mischaracterized the Eleventh Circuit's holding in regard to the admissibility of the evidence concerning events at the Foley plant. Contrary to

[39] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. —, 113 S. Ct. —, 125 L. Ed. 2d at 428.

Plaintiffs' assertion, the Eleventh Circuit did not hold such evidence to be inadmissible. In fact, the Eleventh Circuit specifically stated, "[T]hat evidence of 'derogatory remarks indicative of a discriminatory attitude' are generally admissible to prove discriminatory treatment."[40] What the Eleventh Circuit did hold was that, based on the particular facts of this specific case, it did not find that the district court abused its discretion by excluding the testimony.

It is axiomatic that a district court must be able to control the trial of a case. As part of this responsibility, the district court has broad discretion to determine the admissibility of evidence and to exclude evidence which the district court finds contrary to the safeguards established in Rule 403, which is specifically designed to give a district court a wide latitude in controlling the case. The reason for this is obvious since "trial judges are much closer to the pulse of a trial than [appellate courts] can ever be, and 'broad discretion' is necessarily accorded them in balancing probative value against prejudice." *United States v. Juarez*, 561 F.2d 65, 71 (7th Cir. 1977).

At issue in the present case are various segments of testimony of Jimmy Hughes, a black manager formerly employed by Buckeye. Hughes was first employed by Buckeye at its Foley, Florida plant in 1973. Hughes transferred to the Flint River plant in 1979. Hughes's employment at the Flint River plant was terminated in June of 1981.[41]

The "pulse" of this case in regard to the admissibility of evidence pertaining to events which occurred at Buckeye's Foley plant began beating as early as June of 1988 when the district court first ruled that such evidence would not be admitted. Thus, long before the offer of proof on which the Eleventh Circuit focused its attention was made, the trial court

[40]Appendix Vol. 1 at 17. The Eleventh Circuit went on to cite with approval two cases holding such evidence to be admissible.

[41]This comes from Hughes's deposition which is part of the record in this case. R-3-83.

was thoroughly familiar with the type of evidence Plaintiffs wanted to introduce.

In addition, Hughes's testimony was brought up at the status conference held on August 31, 1988,[42] at which time Buckeye again objected to introduction of evidence regarding what allegedly occurred at the Foley plant and, *a fortiori*, any testimony of Hughes regarding that topic. The district court noted that it had already ruled that evidence regarding alleged discriminatory incidents at Foley would not be admitted. Plaintiffs responded that Hughes had information about managers, who worked at the Foley plant and were transferred to the Flint River plant, which established prejudice and racial animus. In view of that comment, Buckeye pointed out to the district court that virtually all of Hughes's deposition testimony dealt with managers other than managers who worked, at any time, at the Flint River plant.

It was with this information and history in mind that the district court, just prior to Hughes's testifying,[43] again sustained Buckeye's objection to evidence regarding events which occurred at the Foley plant. This ruling, in turn, led to the offer of proof which was addressed by the Eleventh Circuit.[44]

During the course of the offer of proof, Plaintiffs explained that there were two issues. The first was that there were alleged discriminatory acts and derogatory comments made by Flint River managers[45] during a period of time when they

[42]R11-156-6-10.

[43]Hughes testified at length regarding all incidents which he viewed as discriminatory while he was employed at the Flint River plant. (R36-5216-72; 5286-93).

[44]This offer of proof was made in the absence of Buckeye's trial counsel and, therefore, its significance is not as clear as it might have been.

[45]Because of the false implication raised in the summary of the offer of proof, as presented to the Eleventh Circuit, Buckeye wants to clarify for the record that no current or former Buckeye employee, including Hughes, ever accused Burt Richards of using racial epithets or making other derogatory

worked at the Foley plant.[46] The second issue was that the Flint River manager, Burt Richards, discriminated against black employees, during the period he was a manager at the Foley plant, by terminating them.[47] As to the first issue, Buckeye had repeatedly objected to the introduction of any evidence that pertained to managers other than managers at the Flint River plant.[48]

It is readily apparent to anyone who reviews the offer of proof that Plaintiffs were attempting to influence and inflame the jury by presenting evidence of alleged use of racial epithets and discriminatory conduct even though it had nothing to do with any manager who worked at the Flint River plant. Plaintiffs simply wanted to infer guilt by association by arguing that these alleged comments and activities occurred at the Foley plant and, as a result, any manager who worked at the Foley plant at any time would be tainted, if not guilty, of this alleged misconduct. The district court did not allow this and determined that it was not going to try all of these other claims of discrimination which occurred at another plant. Thus, the district court, relying on Rule 403, held that such evidence would unduly prolong the trial and was needlessly cumulative.[49]

comments regarding blacks.

[46]According to Hughes, many of these alleged comments and incidents occurred as far back as 1973, more than six years prior to employees even being hired for the Flint River plant and were not attributable to any manager who worked at Flint River. In fact, many of them were not attributable to any manager but to hourly employees.

[47]Buckeye had previously submitted to the district court that, if such a general statement regarding Richards's allegedly discriminatorily terminating blacks while at Foley was admitted, then Buckeye would be forced to produce evidence regarding any termination of a black employee in which Richards was involved. Thus, if there were twenty-three such terminations, as Hughes indicated, then Buckey would have had to produce evidence regarding all twenty-three terminations.

[48]August 31, 1988 status conference; R11-156-6-10.

[49]R35-5167-69.

Even though the district court did limit the admissibility of this evidence, the district court still left the door wide open for Plaintiffs to use any information they had as to any Flint River manager, regardless of where or when it occurred, for impeachment purposes. Thus, Plaintiffs had a standing invitation to introduce any relevant evidence they had regarding any Flint River manager who had anything to do with the case being tried.

There is no dispute in any circuit that district courts are granted broad discretion in ruling on evidentiary matters coming within the purview of Rule 403.[50] Thus, the only real question before this Court is whether or not the Eleventh Circuit erred by finding that there was no clear abuse of discretion when the district court limited Plaintiffs as to what evidence could be introduced regarding events occurring at the Foley plant.

In reaching this conclusion, the Eleventh Circuit noted that the district court found that the trial would be unduly prolonged if the district court had to try discharge cases and other claims of discrimination which occurred at another time and another place. The Eleventh Circuit also observed that the district court even went so far as to state that it might be willing to prolong the trial, if Plaintiffs were able to show that these occurrences at the Foley plant had some special significance to the case being tried. Plaintiffs were either unable or unwilling to do that. Finally, the Eleventh Circuit recognized that the

[50] *Harrison v. Sears, Roebuck and Co.*, 981 F.2d 25 (1st Cir. 1992); *In Re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831 (2d Cir. 1992); *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184 (3d Cir. 1990); *Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510 (4th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *Johnson v. Ford Motor Co.*, 988 F.2d 573 (5th Cir. 1993); *In Re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1982); *Wallace v. Mulholland*, 957 F.2d 333 (7th Cir. 1992); *Greenwood Ranches, Inc. v. Skie Const. Co.*, 629 F.2d 518 (8th Cir. 1980); *Hill v. Rolleri*, 615 F.2d 886 (9th Cir. 1980); *Durtsche v. American Colloid Co.*, 958 F.2d 1007 (10th Cir. 1992).

district court had provided the Plaintiffs with the opportunity to introduce any relevant evidence pertaining to occurrences at the Foley plant, if Plaintiffs used such information for impeachment purposes.[51] Based on that, the Eleventh Circuit concluded that the district court's limited ruling on the admissibility of portions of Hughes's testimony was not an abuse of discretion. Buckeye submits that the Eleventh Circuit's holding and the underlying ruling of the district court were correct, in keeping with Rule 403 and applicable case law, and that the Plaintiffs have provided no persuasive reason why this Court should review that decision.

3. Since All Of The Plaintiffs Failed To File A Charge Of Discrimination With The EEOC Within 180 Days Of The Last Application Of The Neutral Policy, *i.e.*, Receipt Of Their Last Career Plan, Their Claims Of Disparate Impact Under Title VII Are Time Barred.

It is axiomatic that a charge of discrimination must be filed with the EEOC within the time limits set forth in 42 U.S.C. § 2000e-5(e)[52] in order to maintain a viable Title VII claim in district court. It is also well settled that the charge must be filed within 180 days of the "discriminatory act." *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). This is true even though such a prior discriminatory act may continue to affect an employee's present wages and fringe benefits. Such a continuing effect does not constitute a continuing violation of Title VII. *Evans, supra*.

[51] Appendix Vol. 1 at 19-20.

[52] 42 U.S.C. § 2000e-5(e) provides, "A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred. . . ." Since there is no deferral issue involved, the 180-day limitation period applies.

Based on these considerations, Buckeye, during the course of the bench trial of the Plaintiffs' Title VII disparate impact claims,[53] reiterated its defense that Plaintiffs' claims were barred by the applicable statute of limitations. Buckeye pointed out to the district court that this Court had recently confirmed, in *Lorance v. A T & T Technologies, Inc.*, 490 U.S. 900 (1989), the distinction between a continuing violation, *i.e.*, an act which constitutes a present violation of Title VII, and those claims which are based on a discrete act which simply have a continuing effect on the aggrieved party. Buckeye demonstrated to the district court that the alleged violations were not continuing violations since there had been no application of the challenged neutral policy within 180 days of the dates on which the Plaintiffs filed their EEOC charges. Plaintiffs chose not to respond to any of the arguments and evidence produced by Buckeye in support of its statute of limitations defense. Indeed, at no time during the district court proceedings or on appeal did Plaintiffs even assert, much less establish, that any one of the Plaintiffs had filed a charge of discrimination within 180 days of the receipt of the most recent career plan.[54]

[53]Plaintiffs routinely erroneously refer to the "trial" of this case as that portion of the case involving the presentation of testimony to the jury during the months of September, October, November and December of 1988. The trial of this case commenced on September 6, 1988, and continued until June 4, 1991, at which time the district court issued its final order regarding disparate impact.

[54]The only response to Buckeye's argument was provided by Plaintiffs in one of their briefs submitted to the district court during the trial of this aspect of the case. Plaintiffs rebuttal of the statute of limitations defense verbatim, *in toto*, was as follows:

> DEFENDANT'S ARGUMENTS REGARDING THE UNTIMELINESS OF THE PLAINTIFFS' SUITS. As Defendant recognizes in its brief (pages 2-3) the issues raised there have already been dealt with by this Court. Plaintiffs do have a comment to show the absurdity of Defendant's argument: under the theory espoused by Defendant, a company could set up a pay system to pay all blacks $1.00 an hour and all whites $100.00 per hour for

It would appear that Plaintiffs' Petition sets forth three theories for reversal of the Eleventh Circuit's holding that the claims were time barred. These are as follows:

A. The discriminatory act constitutes a continuing violation because (1) the effects of the discriminatory act, *i.e.*, the receipt of a lower paycheck, constitutes a new violation each time a paycheck is received, or (2) the wage freeze, which was instituted in October of 1984, resurrects the untimely charges because the wage freeze continued the effects of the prior discriminatory acts.[55]

B. The statute of limitations should have been tolled.

C. Buckeye waived its statute of limitations defense.

Buckeye will address each of these issues.

performing the same job. Then, if it safely got past a six month threshold, the blacks would be forever barred from suing to change the effects of the pay system. It is hard to believe that Defendant wasted 30 pages of its brief on an issue which has been litigated to death and decided by this Court. Plaintiffs will not rise to the bait and so decline to respond further. (1SR1(1991)-225-5).

[55]It also appears that Plaintiffs may be claiming that the Eleventh Circuit erred in requiring that a charge of discrimination be filed within 180 days of the first instance on which an alleged discriminatory policy is applied. Since the Eleventh Circuit did not say that and, indeed, said just the opposite, Buckeye will not address that contention, if, indeed, it is a contention. The Eleventh Circuit clearly relied on the fact that last application of the contested policy did not occur within 180 days of the filing of the charges and specifically noted that, "Indeed, Appellants do not contend that the P&P system was applied to any Appellant within the limitations period." (Appendix Vol. 1 at 31).

A. The Acts Complained Of By Plaintiffs Do Not Constitute A Continuing Violation.

Plaintiffs' claim that there is conflict between the Eleventh Circuit and the other circuits and with this Court regarding the distinction between a time barred discriminatory act which continues to adversely affect an employee and a "continuing" violation. It is clear, however, that the Eleventh Circuit's opinion in this case is in complete accord with this Court's decisions which emphasize that the crucial element in such cases is establishing when the "discriminatory act" occurred. There also is no conflict between the Eleventh Circuit and the other circuits as to the significance of this Court's decisions, including *Evans*, *Lorance* and the other cases regarding the distinctions which must be made in regard to continuing effects, as opposed to continuing violations. For example, in *Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990), the court cautioned that, "[C]ourts must be careful to differentiate between discriminatory acts and the ongoing injuries which are the natural, if bitter, fruit of such acts."[56]

As the Eleventh Circuit noted, it had applied the traditional continuing violation analysis, as developed by this Court

[56] *See Gilbert v. City of Cambridge*, 745 F. Supp. 42 (D. Mass. 1990), *aff'd* 932 F.2d 51 (1st Cir. 1991); *Fleming v. N.Y. Univ.*, 865 F.2d 478 (2d Cir. 1989); *Jewett v. International Tel. and Tel. Corp.*, 653 F.2d 89 (3d Cir.), *cert. denied*, 454 U.S. 969 (1981); *Bronze Shields Inc. v. N.J. Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982); *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1992), *cert. denied*, — U.S. —, 112 S. Ct. 1997, 118 L. Ed. 2d 593 (1992); *Hamilton v. 1st Source Bank*, 928 F.2d 86 (4th Cir. 1990); *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993); *Hendrix v. City of Yazoo City, Miss.*, 911 F.2d 1102 (5th Cir. 1990); *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993); *Dixon v. Anderson*, 928 F.2d 212 (6th Cir. 1991); *E.E.O.C. v. City College of Chicago*, 944 F.2d 339 (7th Cir. 1991); *O'Shea v. City of San Francisco*, 966 F.2d 503 (9th Cir. 1992); *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981); *Purrington v. University of Utah*, 996 F.2d 1025 (10th Cir. 1993).

and the other circuits.[57] Curiously, Plaintiffs do not address this issue. Plaintiffs simply try to circumvent the reasoning of the Eleventh Circuit by claiming that *Bazemore v. Friday*, 478 U.S. 385 (1986) precludes such an analysis. As the Eleventh Circuit noted, however, Plaintiffs' reliance on *Bazemore* is misplaced. *Bazemore* holds that, "Each week's paycheck that delivers less to a black than to a *similarly situated* white is a wrong actionable under Title VII. . . ."[58]

The fallacy of Plaintiffs' argument is that, as soon as the employees received different career plans, they were no longer "similarly situated." Indeed, it is the very difference in the career plans about which Plaintiffs are complaining. Plaintiffs do not now nor have they ever contended that blacks and whites with the same career plans were treated differently. Their whole argument is that whites got better career plans and, therefore, the career planning process had a disparate impact on the blacks.

Stated another way, in order to maintain a disparate impact claim, the Plaintiffs cannot be contending they were paid less because they were black, *i.e.*,, the holding in *Bazemore*, but can only contend that they were paid less because of the career plans they received. The triggering event, *i.e.*, the discriminatory act, must, therefore, be when the Plaintiffs received their career plans.

Even the most cursory of readings of *Bazemore* establishes the clear distinction between that case and the present case. Indeed, as was noted by the Eleventh Circuit, this Court in *Lorance* emphasized the distinction between a facially discriminatory policy and a facially neutral policy. In *Bazemore*, there was no dispute that the policy in question was to pay black employees less than white employees who were performing the exact same job. The reason, and the only reason, that the black

[57]Appendix Vol. 1 at 29.

[58]478 U.S. at 395. (Emphasis added).

employees were paid less was because they were black. That is why this Court noted the distinction in *Lorance* and emphasized that a facially discriminatory policy, by definition, discriminates each time it is applied. The *Lorance* Court went on to note that, "This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks*—which focuses on the timing of the *discriminatory* acts for purposes of the statute of limitations."[59]

Plaintiffs in this case must, by the very nature of their claim, acknowledge that they were not similarly situated to those whites who were receiving a higher rate of pay because they had different career plans. By definition, the Plaintiffs had to be dissimilarly situated, *vis-a-vis* career plans, to those whites who were receiving higher pay since it was the career plan which dictated what the pay would be.[60]

The record in this case makes it abundantly clear that Plaintiffs' entire case rests on the premise that they were not similarly situated because they received less valuable career plans. For example, one of the Plaintiffs, Plant, testified about the pay disparity as follows:

> [I complained] [a]bout the blacks in Unit I. . .being kept on the lower pay curves because they don't have

[59] *Lorance v. A T & T Technologies, Inc.*, 490 U.S. at 912 n.5. (Emphasis in original).

[60] The district court noted:

> When establishing a technician's pay curve, Buckeye primarily considered the career plans, the skills contained therein, and the points assigned to those skills. Buckeye's system considered all of the skills contained in the career plan, before they were acquired and whether or not they were ever acquired.
>
> * * *
>
> The second career plans also contained primary, secondary and cross skills which were to be learned by the technician, and they were the essential ingredient in establishing a technician's pay curve. (Appendix Vol. 1 at 66, 70).

> anything in the career plans. The career plans dictated what you got paid. If you don't have anything in your career plans, it would justify you not getting paid a higher level.[61]

There was similar testimony from every other Plaintiff involved in this case.[62] Plaintiffs' first argument as to why the violation is a continuing violation is, therefore, contradicted by their own testimony. Buckeye submits that *Bazemore* is not applicable to the instant case and that the Eleventh Circuit's reasoning, unchallenged by Plaintiffs, is correct and needs no review by this Court.

Plaintiffs' second argument, *i.e.*, that the pay freeze creates a continuing violation, warrants little discussion. Plaintiffs' claim that the pay freeze converted the violation into a "continuing violation" because it perpetuated the effects of the career plans. The Eleventh Circuit rejected this argument, and rightfully so, since it is clear that the decisions of this Court have unequivocally established that such a facially neutral act

[61]R13-387-88.

[62]Ross complained that blacks were lacking various skills in career plans (R36-5345-47; Exhibit D-3 at 4); Porter testified that he was not allowed to have a career plan that had any real value to it (R28-3764); Slaughter testified that the whites were doing different jobs since the whites had more in their career plan than he did (6SR-9-83-84); one of Herring's complaints was that she had a skill area removed from her career plan which dropped her a pay curve (1SR1/1991-197-9); Scott testified that "in order to advance up a pay curve significantly, you had to have a very good career plan, and having talked to several technicians and had asked them what their career plans were, I knew that, from it, that you could not progress very well with the career plan I had." (R22-2304); White testified that he knew that the differences in the career plans is what established the differences in the pay (R24-2902-03); Taylor thought he was discriminated against because he did not have a particular skill in his career plan (R39-5853); Palms testified that he knew that removing a skill area from his career plan would drop him a pay curve (D-14 at 14); Homer testified that he knew, as a result of the career plans, that whites were on higher pay curves and the blacks on lower pay curves (R18-1562-3).

does not resurrect an untimely charge and provide a basis for a valid claim.

The *Lorance* Court specifically addressed this issue and confirmed the holding in *Evans* that a facially neutral act does not make a prior discriminatory act timely, even though it may give a present effect to a past act of discrimination. The *Lorance* Court went on to note that, "Petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complaint of a continuing violation."[63]

As noted by the Eleventh Circuit, the pay freeze applied to every employee in the plant. In addition, Plaintiffs never claimed there was any discriminatory motive in implementing the pay freeze. The Eleventh Circuit's conclusions regarding the pay freeze are, therefore, legally correct and warrant no review.

B. Since The Plaintiffs In This Case Had Ample Information Months, If Not Years, Prior To The Dates On Which They Filed Their Charges Of Discrimination, There Is No Basis For Tolling The Statute Of Limitations.

After this case had been briefed and argued, the Eleventh Circuit, on July 31, 1992, requested that supplemental briefs be submitted regarding the specific issue of equitable tolling. Plaintiffs filed four supplemental letter briefs[64] and Buckeye filed two.[65] Thus, the parties were provided more than ample

[63]*Lorance v. A T & T Technologies, Inc.*, 490 U.S. at 908.

[64]Supplemental letter briefs dated August 14, 1992, September 4, 1992, and September 28, 1992; Response to Buckeye's letter brief dated September 1, 1992.

[65]Supplemental Brief dated August 24, 1992 and Reply to Plaintiffs' Supplemental Brief dated September 18, 1992.

opportunity to present all of the facts and legal arguments regarding this issue to the Eleventh Circuit.[66]

The Eleventh Circuit reviewed these facts and concluded, in accordance with the applicable case law, including this Court's decision in *Zipes v. TransWorld Airlines, Inc.*, 455 U.S. 385 (1982), that the Plaintiffs had more than ample information to support a charge of discrimination long before they actually filed their charges.[67]

Since the Plaintiffs do not even contend that the Eleventh Circuit misinterpreted or misapplied the law in reaching its holding that the statute of limitations was not tolled, Buckeye will not respond further. Plaintiffs' own argument, and lack thereof, establishes that there is no reason for this Court to review this issue.

C. The Statute Of Limitations Defense Was Not Waived.

Plaintiffs contend that Buckeye waived its right to raise the statute of limitations defense. This argument also warrants little discussion. There is no question that the statute of limitations defense was raised in Buckeye's answer to each of Plaintiffs' complaints. Indeed, in one of Plaintiffs' supplemental letter briefs to the Eleventh Circuit,[68] they quoted detailed

[66]For example, Buckeye's Supplemental Brief consisted of fifty pages. Approximately forty-five of those pages dealt with the facts contained in the record on appeal which established that the Plaintiffs were fully aware of the effect of career plans, that whites had "better" career plans and that whites were being paid more as a result of those career plans.

[67]The Eleventh Circuit listed some, but by no means all, examples of admissions of Plaintiffs that they were aware of the alleged discriminatory effect of the career plans many months, and even years, prior to the date on which they filed their charges. (Appendix Vol. 1 at 50-51. *See also* note 62, *supra*, which contains examples which occurred in 1981, 1982 and 1983.)

[68]September 14, 1992 Supplemental Letter Brief.

language from the answers showing that the statute of limitations defense was specifically and unmistakably set forth.

The statute of limitations issue was also raised in pretrial proceedings. At the status conference held on August 31, 1988, the district court raised a question about disparate impact. Buckeye's counsel responded, "I think the disparate impact theory is admissible, your Honor. I think we've got certain limits and certain problems with it. I don't think [Plaintiffs have] any basis for recovering under career plans since that is clearly outside the statute of limitations."[69] Also, contrary to the Plaintiffs' inference, the statute of limitations issue was raised in Buckeye's Motion for Directed Verdict as to the § 1981 claims.[70] In that motion, Buckeye did not address the Title VII disparate impact claims since they were to be resolved at a later date.[71]

The Eleventh Circuit reviewed this waiver argument in detail and rejected it. Plaintiffs again have failed to present to this Court any legal basis for concluding that the Eleventh Circuit erred. There is, therefore, nothing before this Court for review.

[69]R11-156-3-4.

[70]Buckeye submitted to the district court that the allegations raised by Plaintiffs did not constitute continuing violations and that they were separate and distinct acts which fell outside of the statute of limitations applicable to § 1981. (R3-95-14-16).

[71]The district court had informed the parties on several occasions, including December 12, 1988, that the district court planned to continue the bench trial of the disparate impact issues after the jury trial portion had been completed. (R55-8922-24).

CONCLUSION

Based on the foregoing arguments and cited authorities as to each issue raised by Petitioners, Buckeye respectfully submits that the Petition for Writ of Certiorari should be denied in its entirety.

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